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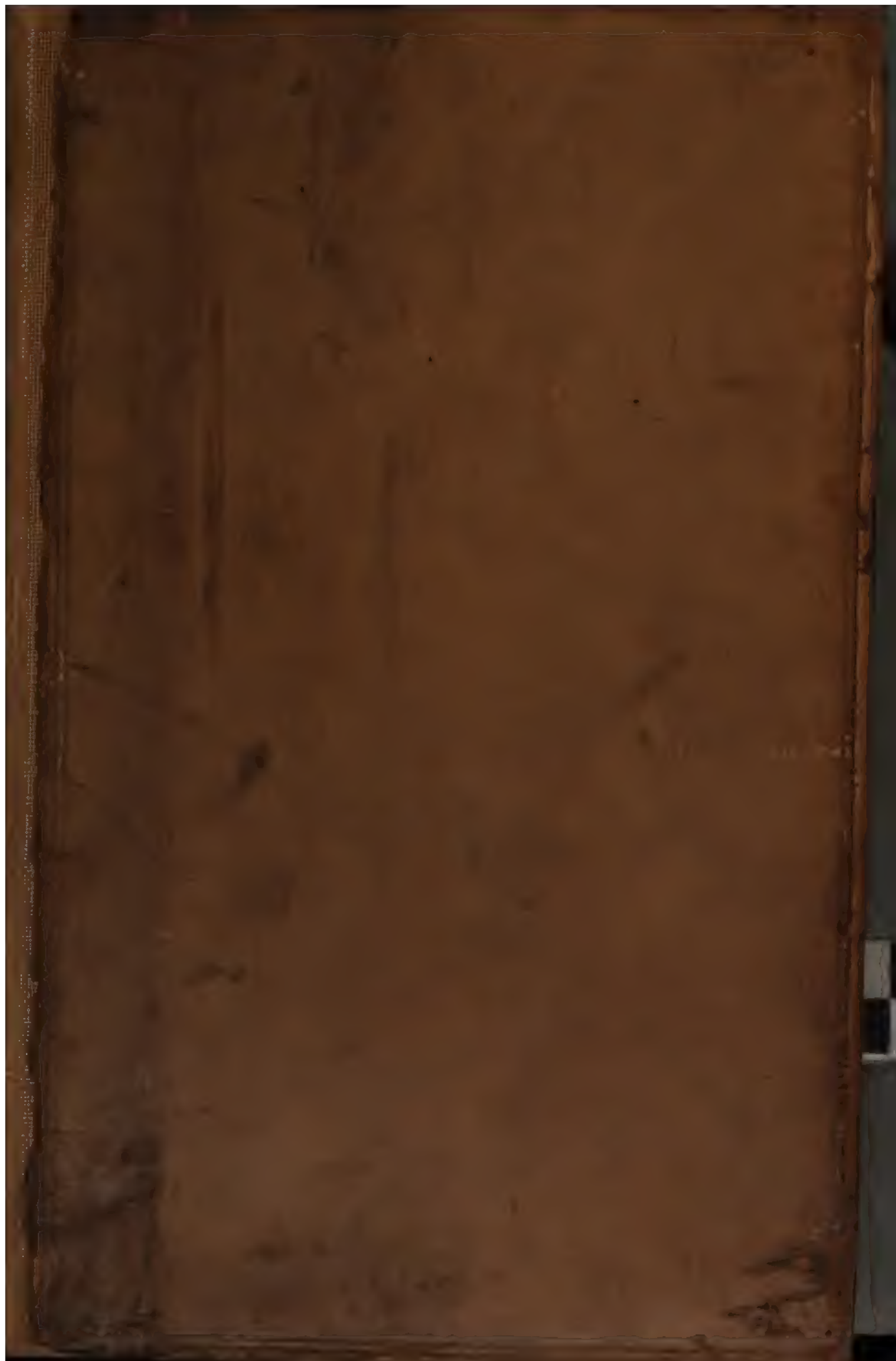
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REPORTS OF CASES

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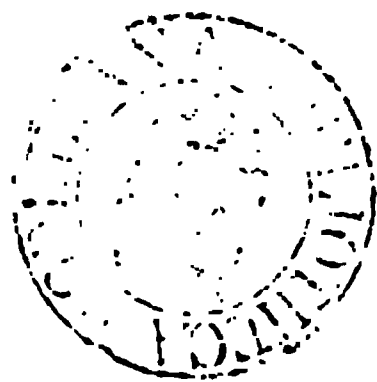
The Circuit:

FROM

THE SITTINGS IN MICHAELMAS TERM, 1823,

TO THE

SITTINGS AFTER HILARY TERM, 1825.



By F. A. CARRINGTON & J. PAYNE, ESQRS.

OF LINCOLN'S INN, BARRISTERS AT LAW.

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1851

1851

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REPORTS OF CASES

ARGUED AND RULED AT

NISI PRIUS,

IN THE COURTS OF

KING'S BENCH AND COMMON PLEAS,

FROM THE

SITTINGS IN MICHAELMAS TERM, 1823,

TO THE

SITTINGS AFTER HILARY TERM, 1824;

AND ON

THE OXFORD SUMMER CIRCUIT, 1823.

WITH

COPIOUS PRACTICAL NOTES.

BY

FREDERICK AUGUSTUS CARRINGTON, ESQ.

OF LINCOLN'S INN, BARRISTER AT LAW.

ADVERTISEMENT.



IN taking these reports, I have varied very little from the plan of my predecessor, MR. CAMPBELL.

I have given a sketch of the pleadings in every case (where they were at all important), and the nature of the evidence adduced; which is useful in the getting up and settling of evidence in cases of a similar nature.

I have also given all those cases in which points of evidence, *onus probandi*, &c. were ruled, as those points are scarcely ever decided in Bank.

I have added notes, and, as far as possible, studied not to make a dry report only, but a practically useful work.

An objection has been made to Nisi Prius Reports, because they relate to the opinions of Judges given “in the hurry of Nisi Prius.”

This really has not the weight which it at first sight appears to have; because, in every case where the decision is revised or altered, it is noticed at the end of the report; and, besides, the use of Nisi Prius Reports is not to give

the fundamental rules of the law, to supersede Bracton, Coke's Institutes, and Lord Hale, but to convey a practical knowledge of Nisi Prius and Criminal Law, to such Counsel, Attornies, and other persons, as have not had an opportunity of constantly attending Courts, for a series of years, to gain the experience for themselves.

If a person has a cause to be tried, which is difficult in its nature, or in the evidence to be given on it, the greatest favour you can do him, is, to put into his hand a Nisi Prius Report of a nearly similar case, and let him know what evidence was given, and who was the Attorney in that case, to give him an opportunity of applying for an inspection of papers, &c.

F. A. C.

No. 13, *Clifford's Inn*,
May, 1824.

CASES

AT

NISI PRIUS.

COURT OF KING'S BENCH.

Sittings in Michaelmas Term, 1823.

BEFORE LORD CHIEF JUSTICE ABBOTT.

1823.

Nov. 19th.

BLACKBURN v. MACKEY.

THIS was an action of assumpsit, brought by the plaintiff, a tailor, against the defendant, for clothes furnished to the defendant's son, Patrick Mackey. Plea—General issue.

The plaintiff's counsel calling Patrick Mackey, he on *voir dire* stated that the clothes were supplied to him, he being then under age, (though now of age).

He was then released by the plaintiff.

In his examination in chief he stated, that the clothes in question were supplied to him by the plaintiff, that he had no means of paying for them, nor any allowance from his father; but he was at that time a writing clerk to Mr. Goren, an attorney in London, his father being a surgeon in Essex; his father did not supply him with any clothes. Mr. Goren paid him a guinea a-week

In cross examination he stated, that the defendant did not know the plaintiff, and he proved the defendant's hand-writing to a letter.

A father is not liable to pay for clothes furnished to his son, though under age, without some proof of a contract on his part, either express or implied.

1823.
 BLACKBURN
 v.
 MACKAY.

The plaintiff's son proved clothes delivered at one time to the amount of 7*l.* 8*s.* 6*d.*; at another time to the amount of 6*l.* 6*s.*

The person at whose house Patrick Mackey lodged in London proved that he was in great want of clothes.

The letter from the defendant to the plaintiff was put in. It was to the effect following—

“ SIR,

“ I am very much surprised that you have
 “ suffered yourself to be imposed on a second time by
 “ that youth. Know then that I do not pay bills for him.
 “ If I had known your address, I would have given you
 “ this notice earlier. If you lose by him you have only
 “ yourself to thank, you had no need to have let him have
 “ your goods. *However, I have no great objection to*
 “ *paying your first bill, if you will send a friend with a*
 “ *receipt, for I do not send money by letter.*

“ I remain, &c. &c.”

Robinson, for the defendant, contended that there was not the slightest promise to pay by the father, and this was not the case of a son living in his father's house; the father did not know of the supply of the goods, and in fact the son was emancipated, and earning a guinea a-week. As to the letter, the promise there, if any, was only conditional, and the condition had not been performed.

ABBOT, C. J.—This is an action for clothes furnished by the plaintiff to the defendant's son, a writing clerk to an attorney. The question deeply affects society; for if persons in trade are allowed to trust young men, and compel their fathers to pay them, any man who had a family might be ruined. A father is not bound to pay for articles ordered by his son, unless the father gives some authority, express or implied. Here no such authority appears, except it is given by the letter; which, however, can only apply to the

first account 7*l.* 8*s.* 6*d.* His lordship read the letter, and said, that if the Jury thought that the offer of payment at the end of it only meant, send a receipt for the first bill, and I will pay that, to hear no more of the business, they ought to find for the defendant; but if they thought it meant to admit an original liability, they should find for the plaintiff for the first bill.

Verdict for the plaintiff for 7*l.* 8*s.* 6*d.*

Scarlett and Godson for the plaintiff.

Robinson for the defendant.

[Attornies—*Goren* and *Bromley*.]

See *Fluck v. Tollemache*, *infra*.

COURT OF COMMON PLEAS.

Sittings after Michaelmas Term, London.

BEFORE MR. JUSTICE BURROUGH.

BARRET and Wife, Executor and Executrix of Cup-
page, v. Moss.

Dec. 10*th*.

THE testator had been an attorney, and in his lifetime had done business as such, for the defendant. The present action was to recover the amount of the bill.

One of the testator's clerks proved that the business had been done, and that the charges were fair and reasonable.

The executor of an attorney suing for an attorney's bill, due to the deceased, need not deliver it a month before bringing an action for it.

1828.

FLUCK

v.

TOLLEMACHE.

Vaughan, Serjt. and *Creswell*, for the plaintiff.*Pell*, Serjt. for the defendant.[Attornies—*Dendy* and *Bell*.]*Sittings after Michaelmas Term, at Westminster.*

BEFORE MR. JUSTICE PARK.

Nov. 29th.

TULLAY v. REED.

If a person enter a house, with force and violence, the person whose house is entered, may justify turning him out (using no more force than is necessary), without a previous request to depart. But if the person enter quietly, a request to depart is necessary, before turning him out.

THIS was an action for assaulting and beating the plaintiff, in which the defendant pleaded the general issue; and a special plea of *molliter manus imposuit*.

Evidence was given of the assault on the part of the plaintiff; and evidence in support of the special plea was given on the part of the defendant.

PARK, J.—Laid it down as clear law, that if a person enters another's house with force and violence, the owner of the house may justify turning him out, (using no more force than is necessary), without a previous request to depart; but if the person enters quietly, the other party cannot justify turning him out, without a previous request to depart.

Verdict for the defendant.

Vaughan, Serjt. and *Andrews*, for the plaintiff.*Pell*, Serjt. and *C. Phillips*, for the defendant.[Attornies—*Harmer* and *W. Jones*.]

If a defendant had turned out a man who had entered his house with violence, without first requesting him to depart, he could

1823.

IVES v. LUCAS and THOMPSON, Esqrs.

Nov. 29th.

THIS was an action of trover against the Sheriff of Middlesex, for wrongfully detaining the plaintiff's horse. Plea—General issue.

It appeared that a sheriff's officer, named Weldon, had taken the horse early in the month of September, 1822.

A witness proved this taking, and that the officer sold the horse to him for £5, about the 15th of September.

To connect the Officer with the Sheriff, a writ of *fi. fa.* against the plaintiff, directed to the Sheriff of Middlesex, was put in; and a receipt signed by Weldon for the warrant granted by the Sheriff, in pursuance of the writ. After this proof, the declarations of the officer were given in evidence, but they carried the case no further than the witnesses had done (a).

As long as a judgment exists, it protects those who seize property, under an execution founded on it; and if the judgment and execution are set aside, no action lies against the sheriff for any thing he did under it, while it remained in existence.

not justify under the plea of *molli-ter manus*; as the request to depart is a material part of that plea. It would be but prudent, (if not absolutely necessary), to plead in addition a special justification, on the circumstances of the case; like that in the case of *Weaver v. Bush*, 8 Ter. Rep. 78, and in such a case a plea of *son assault demesne*, might be as well added, because, in making a violent entry into a man's house, it is by no means unlikely that an assault might be committed.

(a) It has long been settled, that the sheriff is answerable for the taking of goods by a bailiff, acting under colour of a warrant from the sheriff; but you must connect the bailiff with the sheriff.

This is best done by proof of the warrant; but as the bailiff in

some cases returns it to the sheriff's office, and in others keeps it, it is proper to give both sheriff and bailiff notice to produce it, to entitle yourself to give parol evidence of it.

And the case of *Drake v. Sykes*, 7 Ter. Rep. 113, decides, that proof that the person who took goods was a general officer of the sheriff, and had given him a bond of indemnity, is not sufficient.

But when you have proved the person to have been the sheriff's bailiff, on the occasion in question, you are then entitled to give his admissions in evidence.

However, in *North v. Miles*, 1 Camp. 389, which was an action for a false return, it was sought to give in evidence, a statement made by the bailiff to the plaintiff's attorney, in answer to a question

1823.
 Ives
 v.
 Lucas
 and Another.

An order of Mr. Justice BAYLEY, dated Nov. 17th, was put in; it ordered the judgment on which the execution had issued to be set aside for irregularity.

PARK, J.—Ruled that the plaintiff must be nonsuited; because, as long as the judgment existed, it protected the sheriff; and no evidence was given that the sheriff had the horse in his possession later than the 15th of September, and the judgment was not set aside till the 17th of November.

Vaughan, Serjt.—Does not your lordship think that the setting aside the judgment, makes the sheriff's acts tortious by relation.

PARK, J.—Certainly not.

Plaintiff nonsuited.

Vaughan, Serjt. and Knowles, for the plaintiff.

Pell, Serjt. for the defendant.

Nov. 29th.

WILSON v. BOWIE.

If a written agreement is not signed by the defendant, the plaintiff need not give it in evidence, though he himself has signed it, and it regards the matter in issue.

THIS was an action for goods sold and delivered, in which the general issue was pleaded.

The action was brought to recover the value of certain fixtures in a house, No. 420, Oxford Street, now occupied by the defendant, but which had been previously occupied by the plaintiff.

by him, why the writ had not been executed? It was objected to, but Lord *Ellenborough* held it admissible, and added, "that though the bailiff's general conversation with an indifferent per-

son is not evidence against the sheriff, yet what he here said, touching the execution of the writ, when remonstrated with by the plaintiff's attorney, is that which the defendant is responsible for."

Mr. Smallbone was proceeding to prove the value of the fixtures, when, in answer to a question by Mr. Serjt. *Vaughan*, he stated that there was a written agreement respecting the valuation, but that it was not signed by the defendant.

1823.
WILSON
v.
BOWEN.

Vaughan, Serjt. for the defendant, contended, that this agreement must be produced.

PARK, J.—As it is not signed by the defendant, I think it need not (a).

The plaintiff's counsel then called for it, under the usual notice to produce papers, and it was produced by the defendant's counsel.

Bosanquet, Serjt. for the plaintiff, having read it, said, it was not an agreement, not being signed by the defendant.

(a) The following is a copy of the paper in question:—


“Memorandum of an acknowledgment of receiving the sum of £10, by way of deposit of taking such fixtures on the premises, at No. 420, Oxford Street, and being such fixtures as Archibald Wilson has a right to sell in and upon the said premises, and to be taken by two appraisers, or their umpire; possession to be given on the 29th of September, 1823, £10 to be deducted out of the whole amount, and rent and taxes to be allowed for up to the day of taking possession.”

“Witness this 27th day of September, 1823.

(Signed) Archibald Wilson.
“James Hill,
No. 23, Gt. Titchfield Street,
Mary-le-bone.”

[A subscribing witness.]

The case of *Brewer v. Palmer*, 1 Esp. Rep. 213, decides that if there appears to be a written agreement, the plaintiff is bound to give it in evidence; and if it cannot be given in evidence, as being unstamped, the plaintiff must be nonsuited: but that case does not affect the present, as there the agreement covered the whole of the subject matter in dispute.

1828.

 WILSON
 v.
 BOWIE.

Vaughan, Serjt. contended, that as the plaintiff's counsel had called for it, they were bound to read it in evidence, and to prove it by the subscribing witness.

If the plaintiff's counsel calls on the other side to produce a paper and reads it; he is bound to give it in evidence, if it is material to the issue; but if it is not material, the plaintiff's counsel need not give it in evidence, though required by the other side to do so.

PARK, J.—Having looked at it, said that it need not be read, as it was only the plaintiff's receipt for £10, and that it was not material to the case at all; and observed, that if the plaintiff's counsel call for a paper, and look at it, they *must* read it in evidence, if it is at all material to the case; but if it does not bear on the case, he need not read it. This paper is of the latter kind, and the plaintiff's counsel may go on without reading the paper, or calling the subscribing witness (*b*).

Mr. Smallbone's examination was then resumed, and the case terminated in a reference to Mr. Storks.

Bosanquet, Serjt. and *Archbold*, for the plaintiff.

Vaughan, *Pell*, and *Taddy*, Serjts. for the defendant.

[Attornies — and *Harnet*.]

(*b*) The case of *Wharum v. Rontledge*, 5 Esp. 235, in which it was decided, that a party calling for papers, and (on the other side producing them) inspecting them, makes such papers evidence for the other side, though he does not use them as evidence, does not at all decide that the party so inspecting them is bound to prove them by a subscribing witness, or make them a part of his case.

Probably, the reason why the defendant's counsel was so solicitous

to have the agreement put in and proved by the subscribing witness, was, that if, when it was produced, it had no stamp, the Judge would, if he thought it the foundation of the action, nonsuit. And, besides, it is probable, that the defendant was aware that the subscribing witness knew some facts in his favor, which he wished to have proved, and yet did not like to risk him in the box as his own witness.

Sittings after Michaelmas Term, London.

BEFORE MR. JUSTICE BURROUGH.

RAWLINGS V. HALL.

Dec. 1st.

THIS was an action of assumpsit on a bill of exchange, dated May 22d, 1823, drawn by one Little, payable to his own order, on the defendant, who accepted it, and endorsed by Little to the plaintiff.

The usual proofs of acceptance and endorsement having been given on the part of the plaintiff—

Vaughan, Serjt.—We have given the plaintiff notice to prove the consideration of the bill.

BURROUGH, J.—That sort of notice does you no good; they are not bound to prove it.

Vaughan, Serjt. stated in his address to the jury, that the bill had been given to Little for a stock-jobbing difference on time bargains for stock, between him and the defendant; the time bargains took place in the month of April and May last; and that all securities given for money gained on such bargains were made void by an act of Queen Anne, and an act of George the Second.

To prove this, a witness named Alison was called: he was clerk to Little, who is a stock-broker. He proved the account to be of his own hand-writing, but knew nothing of it, except that he copied it from Little's pocket ledger.

Little being called, stated that he was a stock-broker; and on being asked to produce his pocket ledger, ad-

In an action on a bill of exchange, a stock-broker may refuse to give evidence that the consideration of it was stock jobbing differences; but whether he is bound to produce his book, kept under the stat. 7 Geo. 2. c. 8. s. 9.—
Quære.

1829.
 RAWLINGS
 v.
 HALL.

mitted, he had received a *subpœna duces tecum*, calling on him to produce it, but declined doing so, saying, he feared it might criminate him.

Vaughan, Serjt. contended, that he was bound to produce it.

BURROUGH, J.—According to your opening, this witness has been making what are called time bargains; for this he would be liable to a penalty; and you want him to produce this book, to show that he has been doing so: he certainly need not produce it.

Curwood, on the same side, contended, that as the witness's own clerk had referred to it, they had a right to have it for him to refresh his memory from.

BURROUGH, J.—You cannot make a man produce his private books, merely because by possibility it may suit your case.—I think you are not entitled to its production.

Curwood then asked the witness if he had ever bought stock for the defendant.

The witness declined answering this.

BURROUGH, J.—He is not bound to answer; for, as you open your case, it was a time bargain; and if he answered in your favour, he would be liable to a penalty.

Vaughan, Serjt. The penalty must be sued for within six months, which have now elapsed.

BURROUGH, J.—If the party would be open to a prosecution of any kind, he is not bound to answer, and he might be prosecuted at common law.

Curwood then put the bill into the witness's hand, and asked him what had been the consideration for it.

This he declined answering; and his lordship held he might do so for the reasons before stated (a).

Verdict for the plaintiff.

1823.
RAWLINGS
v.
HALL

Taddy, Serjt. and *Wylde*, for the plaintiff.

Vaughan, Serjt. and *Curwood*, for the defendant.

[Attornies—*Birket* and *Eike*.]

BEFORE GIFFORD, C. J., PARK AND BURGESS, JS.
In Bank.

RAWLINGS v. HALL.

Jan. 26.

Vaughan, Serjt. now moved for a new trial, and contended, that the witness, Little, ought to have been compelled to produce his book, however it might criminate him; because by the statute, 7 Geo. 2, c. 8, §. 9, it was enacted under a penalty, that every broker should keep a book, and enter therein all purchases and sales that he made. Now that clause would be nugatory, if such book

(a) It may make this case more intelligible, to state, that a time bargain at the stock exchange, is simply this:—Neither buyer nor seller have any stock, but the buyer agrees (nominally) to buy of the seller stock, *e. g.* £1000, on a certain day. When that day arrives, if the stock is at a lower price than when the bargain was made, the buyer pays the seller as much per cent. on the £1000, as the stock has fallen: but if the stock has risen, the seller pays the buyer in a similar way.

The sums so paid are called differences.

In fact, a time bargain is a mere wager; the seller betting that the stock will fall, the buyer that it will rise.

But by the statute 7 Geo. 2, c. 8, § 8, made perpetual by 10 Geo. 2, c. 8, all contracts made for the transfer of stock, whereof the person in whose behalf the contract is made, shall not, at the time of such contract, be possessed, are declared null and void; and the party on whose behalf

1884
 RAWLINGS
 v.
 HALL.

could be kept out of sight, merely because it would criminate the broker.

BURROUGH, J. observed, that, at the trial, his attention had not been called to the clause of the statute that made it compulsory on the Broker to keep a book.

The Court then granted a rule to show cause.

this is done, is, if he is privy to the transaction, to forfeit £500, and the broker £100, half to the king, and half to him who will sue.

By the statute 9 Anne, c. 14, all securities for money won at gaming are declared void.

The privilege of the witness (Little) does not seem to be affected by the statute of 46 Geo. 3, c. 37, which only compels witnesses to answer, though they might thereby establish a debt against themselves, or subject themselves to an action: but where the answer would subject the witness to *penalty*, or forfeiture, the law remains untouched by this act.

The six-month's limitation of actions is confined to actions to recover back money paid for differences, and does not extend to actions on the 8th sect. of the act, for the recovery of the penalty of £500. The only limitation in that case being the same as is applicable to all *qui tam* actions under the stat. of 31 Eliz. c. 5, § 5, which enacts, that all actions, suits, bills, indictments, or informations, which shall be had, brought, sued, or exhibited, for any forfeiture, on any

statute penal, *made or to be made*, whereby the forfeiture is or shall be limited to the Queen, her heirs, or successors *only*, shall be had, brought, sued or exhibited, within two years next after the offence committed, and not after; and all actions, suits, &c. which shall be had, brought, sued, or commenced, for any forfeiture, on any penal statute, *made or to be made*, (except the statute of *tillage*) the benefit and suit whereof shall be limited to the Queen, her heirs, or successors, and to any other which shall prosecute in that behalf, shall be had, brought, sued, or commenced by any person that may lawfully pursue for the same as aforesaid, within one year next after the offence committed; and, in default of such pursuit, may be had, sued, &c. for the Queen, her heirs, and successors, at any time within two years after that year ended.

Any action after that time to be null and void and of no effect.

But by § 6, it is provided that if any act limits a shorter time for suing in such case, this act is to give no extension.

1828.

MILNER & al. v. TUCKER.

Dec. 1st.

THIS was an action of assumpsit for a chandelier sold by the plaintiffs, glass manufacturers in London, to the defendant, who is proprietor of the assembly rooms at Cromer, in the county of Norfolk. It appeared in proof that the plaintiffs were to supply a complete chandelier, sufficient to light the room in question properly. One of the plaintiffs, it was proved, had seen and measured the ball room; and it was also proved that the chandelier was incomplete, and was by no means adequate to the room. After the lapse of nearly six months the defendant returned it.

If goods are supplied not conformably to the order for them, the buyer is bound to return them within a reasonable time, or he will be bound to pay for them.

BURROUGH, J.—When the defendant received the chandelier, and found it incomplete and inadequate to the room, he should have given the plaintiff notice immediately; and have returned it as soon as he could: but if a man take an article, and keep it, and use it as his own, though it was not according to contract, he is bound to keep it, and pay for it.

Verdict for the plaintiffs.

Vaughan, Serjt. and *Hutchinson*, for the plaintiffs.

Cooper for the defendant.

[Attornies ——— and *Withers*]

1823.

Adjourned Sitings after Mich. Term, at Westm.

BEFORE MR. JUSTICE PARK.

Dec. 2d.

LEGGAT v. REED.

In actions for work and labour, if it appears that the plaintiff has once given credit to A. he cannot afterwards shift his claim, and charge B.

THIS was an action for work and labour, in putting up a door at a house in Beaumont Street. Plea—General issue.

Evidence was given to show that the defendant gave the order for the work, but the door was put up in the house of a Captain Earl, at whose house a bill had been left by the plaintiff, headed Captain Earl.

The defence was, that the defendant was an upholsterer, and had nothing to do with the business, except giving the order on behalf of Captain Earl, to whom it was contended that the credit was given.

PARK, J.—Laid down, that if the plaintiff had *once* given credit to Earl, he could never shift his claim to charge the defendant or any other person. His Lordship then left it to the Jury, to say to whom the credit was given, whether to Earl or to the defendant.

Verdict for the defendant.

Pell, Serjt. and *Stork*, for the plaintiff.

Vaughan, Serjt. for the defendant.

A still stronger case, on the question, "To whom credit was given," was tried before Mr. Baron GARROW, at the Gloucester assizes.

It was the case of *Taylor v. Brittan*. It appeared that the plaintiff, a jeweller, had supplied the wife of the defendant, who was a merchant's

1823.

MARTIN v. JACKSON.

Dec. 2d.

THIS was an action for work and labour, in which the general issue was pleaded.

The usual proofs of the work being done, and reasonableness of the charges being gone through—

The defendant's counsel wished to call a witness named *Flashman*, to prove that he had done the work, and therefore he, and not the plaintiff, was entitled to be paid for it.

Whether in an action for work and labour, the party who actually did the work is a competent witness to prove that he, and not the plaintiff, is the person to be paid.—*Quære.*

Taddy, Serjt. objected to this witness, on the ground that he was not competent to prove his own title to the money in question, and relied on the case of *Bland v. Ainsly*, 2 N. R. 331 (*u*).

PARK, J.—I shall not stop this case, for I know the case of *Bland v. Ainsly*, has been questioned.

Flashman was then examined, but his evidence not amounting to any thing, there was a

Verdict for the plaintiff.

clerk, with jewellery to a large amount. It appeared that the bill delivered was headed "*Mrs. Brittan*," and that at the time of the purchase of the articles, *Mrs. Brittan* stated that she bought the articles for a friend in the West Indies, who would send the money for them as soon as received; to which the defendant said—"That will do very well."

GARROW, B.—Ruled that though *Mrs. Brittan* was a feme covert, yet if the jeweller gave credit to her and the remittances she was to obtain from the West Indies, and

not to her husband, the present action against *him* could not be maintained.

The jury found for the defendant.

And in the case of *Bently v. Griffin*, 5 Taunt 356, it was left as a fact to the jury, whether credit was given to the husband or the wife, for the wife's dresses, though she and her husband lived together.

(*a*) The case of *Bland v. Ainsly*, 2 N. R. 331, was an action of trespass, for taking the plaintiff's goods under an execution against a person

1828.

Dec. 2nd.

DAVIS v. STREET.

If a contract is broken, an action for money had and received will not lie for money paid under it; an action for the breach of contract is the proper remedy: but if the contract has been rescinded it is otherwise.

THIS was an action for money had and received, with the common money counts, (but no special count) to recover back the sum of 47*l.* 5*s.*, paid by the plaintiff to the defendant for a horse, which had been returned to the defendant. Plea—General issue.

For the plaintiff it appeared that he (being a surgeon, and the defendant a horse dealer,) had bought a horse, warranted sound and quiet, of the defendant; which horse being decidedly vicious he returned. The defendant at first refused to take the horse back, but it was at length agreed that he should do so, and the plaintiff receive from him another horse, paying £10 more; another horse was accordingly sent to the plaintiff, who never paid the additional £10. This second horse being worse than the first, was afterwards returned, and the defendant received him back.

PARK, J.—Early in the cause ruled, that the question of soundness could not be gone into in this form of action, the question here being whether the contracts were rescinded or not.

Vaughan, Serjt. contended that the plaintiff ought to be nonsuited, for here was a contract for a horse, which the plaintiff afterwards dislikes; that contract is agreed to be rescinded on the terms of his taking another horse, *and paying* £10. As he had never paid the £10, the first contract remained in force.

named Aubray; it was sought to call Aubray, on the part of the defendant, to prove that the goods were his, and not the defendant's. But the court held Aubray incom-

petent; for that it was his interest to make out the goods to be his own, as then the execution against him was satisfied, and a debt he owed paid.

Holt, on the same side, contended, that the fulfilling the second contract annulled the first; now the first contract was only to be annulled by the taking another horse, and paying £10. Those conditions precedent must be fulfilled, before the first contract was at an end; as they had not, the first contract stood.

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DAVIS
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PARK, J.—I think there is no ground for this objection. It appears that the defendant sells the plaintiff a horse that no human being could use; and, on the return of him, it is agreed that he shall have another, and pay £10, and the defendant take the first back. I am clearly of opinion such second contract completely put an end to the first, and I also think that the defendant receiving back the second horse, as clearly put an end to the second contract.

In his charge to the jury his Lordship laid down, that if a contract is broken, an action for money had and received cannot be brought by a person who has paid money under such contract, but he must bring an action for the breach of contract; but, in cases where the contract is rescinded, and put an end to, the consideration for the payment of money failing, this species of action is proper (a).

(a) The distinction taken by the learned Judge, that a plaintiff cannot recover on the count for money had and received, in cases where the grievance he complains of is a breach of contract, appears to be fully established by the cases. This count applying not to a breach of contract, but to the defendant having money in his hands belonging to the plaintiff, by reason of the failure of the consideration which induced the plaintiff to pay it to the defendant.

In the case of *Power v. Wells*,

Doug. 24 n. and 2 Cowp. 818, the plaintiff gave his own horse and twenty guineas in exchange for the defendant's horse, receiving a warranty that the defendant's horse was sound. He was unsound.

The plaintiff brought an action for money had and received, for the twenty guineas, and an action of trover for his own horse.

The court of King's Bench held that the action for money had and received, *with no other count*, was an improper action to try the warranty; and held that the action of

1822.
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 DAVIS  
 v.  
 STREET.

Verdict for the plaintiff, damages 31*l.* 5*s.*; £16 having been paid into court (b).

*Pell*, Serjt. and *Storks*, for the plaintiff.

*Vaughan*, Serjt. and *Holt*, for the defendant.

[Attornies—*Mills* and ——— ]

trover would not lie for the recovery of the plaintiff's horse, as the property in that horse had passed by the exchange.

And in the case of *Weston v. Downes*, Dougl. 23, the court expressly held, that if a contract is rescinded, an action for money had and received lies for money paid under it: for if the contract is broken, this action does not lie; but an action for the breach of contract must be brought.

The same principle was fully recognised in the case of *Towers v. Barret*, 1 T. R. 133.

In general, in cases of breach of warranty of horses, the plaintiff declares, that in consideration of so much money paid him, the defendant assumed and promised that the horse was sound; but that it really was unsound. To this are added a count for money had and received, and the common money counts. If on the trial it appears to have been a breach of warranty, the plaintiff recovers on the first count, but if the contract was rescinded, he recovers on the second.

The action for money had and received lies in a variety of other cases: for money paid without consideration, money paid by compulsion or mistake, &c. but it was held

in the case of *Bilbie v. Lawley*, 2 Ea. Rep. 469, that if one pays money with full knowledge, or the means of such knowledge in his hands of all the circumstances, he cannot recover back such money, on account of its having been paid under an ignorance of the law.

(b) In this case there was no special count, or the money ought not to have been paid into court on the whole declaration: for if there is a special count, and you pay money into court on the whole declaration, you thereby admit the contract to be as laid, and only go to trial on the quantum of damages incurred by the breach of it. This was clearly laid down in the case of *Yate v. Willan*, 2 Ea. 128, where the first three counts of the declaration stated a special agreement by the defendant, a common carrier, to carry the plaintiff's trunk from London to Oxford, and that the trunk was lost.

The defendant paid £5 into court on these three counts.

The plaintiff's counsel proved this payment of money into court, and that the value of the trunk was £20, contending that the payment of money into court on those counts admitted the contract.

The defence was the usual £5 notice.

1823  
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BEFORE MR. JUSTICE BURROUGH.

ALISON v. FOISTER.

Dec. 3d.

**THIS** was an action against the defendant, for the injury occasioned by the careless driving of his servant, in driving a post chaise against the plaintiff's chaise cart.

The first count of the declaration alleged those facts, and that the chaise cart was broken to pieces, and the

In an action against a defendant for the injury occasioned by careless driving of his servant, the plaintiff may recover for injury done to his wife, as well as himself, without bringing a separate action for each.

The court of King's Bench held, that by this payment of money into court on these counts the defendant admitted the contract, and disputed only the quantum of the damage. The plaintiff therefore only had to prove the amount of damages above the sum paid into court.

But in *Clark v. Gray*, 6 Ea. 564, it was held, that the defendant might go into any evidence that went to limit the damages, but not to vary the terms of the contract admitted by the payment of money into court.

And in *Guttridge v. Smith*, 2 H. B. 374, it was held that the payment of money into court on account, on a bill of exchange, renders it unnecessary to prove the drawer's hand-writing.

But as the defendant only admits the contract to be as laid, he does not thereby preclude himself from disputing the legality of it. 1 Ter. Rep. 464.

However, in cases where a party wishes to pay money into court, without prejudicing himself in this way, he should either pay in the money on the general counts only, or apply to the court for leave to

pay it in on particular conditions.

Before leaving this subject, it may be as well to state, that if the plaintiff takes out money paid into court on one count of the declaration, he is not entitled to the costs of the other counts. *Skarratt v. Vaughan*, 2 Taunt. 266.

The way to prove the payment of money into court, is to produce the rule, or an office copy of it; calling the attorney who took the money out of court, is not sufficient.

In Hilary Term, 1810, the Court of Common Pleas promulgated the following rule of practice, for trials at Nisi Prius, (reported in 2 Taunt. 267)—

“ It having been often a question, whether the defendant producing the rule for payment of money into court, was evidence on his behalf, so as to entitle the plaintiff's counsel to a reply; if the plaintiff took a verdict for his whole demand, without giving credit for the money paid into court, the court would set aside the verdict, without requiring proof of the rule. Therefore it is not evidence for the defendant so as to entitle the plaintiff's counsel to reply.”

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plaintiff thrown down and injured, and his wife also bruised and injured, whereby he was put to great expense, and lost the society, &c. of his said wife.

The other counts stated separately the injury to himself and his wife, and the breaking the chaise cart. Plea—The general issue.

The evidence went clearly to prove the injury and the negligence.

*Vaughan*, Serjt. contended, that as the wife was no party to the action, the injury done to her, could not be reckoned in the damages.

BURROUGH, J.—They can be recovered in this action, and if the plaintiff recover here, he can bring no other action for them. And his Lordship distinctly told the jury to find damages for the injury done to the plaintiff and his wife, as well as the breaking of the carriage.

Verdict for the plaintiff, damages £150.

*Pell*, Serjt. and *Abraham*, for the plaintiff.

*Vaughan*, Serjt. for the defendant.

[Attornies—*Hubert* and *Caslon*.]

Dec. 4th.

TINDAL v. WHITROW.

An admission by a party, that he is in possession of certain premises, is no evidence of his possession on any day antecedent to that on which the admission is made.

THIS was an action of replevin, and one of the points in issue was, whether the plaintiff was tenant to the defendant's principal, a Mr. Farlar, as whose bailiff the defendant justified.

A witness stated that in the month of October, 1822, the plaintiff told him he was tenant to Farlar.

BURROUGH, J.—Ruled that that was no proof that he was

tenant, antecedent to the day on which the admission was made.

But on another witness being called to prove that the plaintiff was in possession of the premises, to which this statement related, at a much earlier period, his Lordship left the whole claim of the earlier rent to the jury, on this evidence of tenancy.

Verdict for the defendant.

1823.  
TINDAL  
v.  
WHITBROW

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STEWART v. COESVELT.

Dec. 5th.

**T**HIS was an action to recover the price of a horse, sold by the plaintiff to the defendant. Plea—General issue.

For the plaintiff evidence was given of the sale, and that the price was a fair one; and the written warranty being called for by the plaintiff's counsel, was produced by the defendant. It warranted the horse sound and free from vice.

If a horse is sold with a warranty, any fraud at the time of the sale will avoid the sale, though it is not on any point included in the warranty.

The defence was, that the sale was avoided by fraud, for that the plaintiff at the time of the sale represented that the horse was five years old, and had often been used as a hunter, but it was proved that the horse, though more than four years old, was not five.

*Vaughan*, Serjt. objected, that as there was a written warranty, in which nothing was said of age, parol evidence was not admissible on that point.

**BURROUGH, J.**—Held it admissible as general evidence of fraud, and his Lordship told the jury, that if there was fraudulent representation at the time of the sale, it invalidated the contract, no matter whether it was a breach of the warranty or not; but here there was no pretence for a charge of fraud.



1823.

STEWART

v.  
CORVELT.

Verdict for the plaintiff, for £147, the price of the horse (a).

*Vaughan*, Serjt. and *Hutchinson*, for the plaintiff.*Bosanquet*, Serjt. and *Comyn*, for the defendant.[Attornies—*Rigby* and *Lawford*.][*Special Jury*.]

Dec. 5th.

STAFFORD and al. Assignees of Wm. Clark, jun. a Bankrupt, v. WM. CLARK, sen.

If a man has goods in his possession, as the servant of his father, for the purpose of carrying on a trade for the father's benefit only, they will not pass to his son's assignees under the stat. of 21 Jac. 1, c. 19.

**THIS** was an action of trover. The declaration consisted of two counts: the first stated, that William Clark, jun. before he became bankrupt, was lawfully possessed of a variety of articles therein enumerated, and of three bills of exchange therein described, which bills and securities for money were of the value of £2000; that the defendant found and converted them before the bankruptcy, and has refused to deliver them to the bankrupt before the bankruptcy, or to the plaintiffs since.

The second count was similar to the first, except that it laid the finding and conversion after the bankruptcy. Plea—General issue.

To support the commission, the proceedings under it were put in, no notice having been given under the statute,

(a) Fraud avoids a contract, both at law and in equity, but mistake is no answer to it at law, but only in equity.

The written warranty of a horse does not require an agreement stamp. The one in the princi-

pal case was not on any stamp, and was still given in evidence. Horse warranties are generally written at the bottom of the receipt for the purchase money, or in the body of it.

49 Geo. 3, c. 121, § 10. By the depositions, the trading was clearly shown; and it appeared that the act of bankruptcy was lying in prison, in the King's Bench prison, two months from the 22nd day of May, 1822. The deposition of the petitioning creditor stated that debt to be due between the first day of October, 1821, and the eleventh day of May, 1822.

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The commission and assignment were put in.

To prove a prior act of bankruptcy, a servant named Sloane was called. He stated that he denied the bankrupt to a creditor, the bankrupt saying he was busy.

It appeared in evidence that the bankrupt had possession of part of the goods up to the time of his failure, but they were the property of the defendant, (his father), who took them back. These were proved to be of the value of £72.

When the bankrupt failed, (but some time before the commission was taken out), his father put him to carry on business for him, as his servant, and bought furniture for the house, where that was carried on: this furniture was to the value of £150. A broker proved that he valued it. He took an inventory in writing.

Vaughan, Serjt. contended, that this written inventory must be produced.

BURROUGH, J.—If he speaks of the value of the goods from recollection, the inventory need not be produced (a).

If a broker proves the value of goods, he need not put in a written appraisalment on stamp.

(a) Objections of this kind are often taken; because, by the stamp act, 55 Geo. 3, c. 184, all appraisements and valuations of effects, real or personal, (except those made under order of a Court of Admiralty, or for the purposes of the lega-

cy duty), must be stamped: and in general, when brokers value goods, they merely make a list in a book without a stamp, and then give in to the employer a gross valuation of the whole in the lump.

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sen.

The bills the defendant had given the bankrupt cash for, previous to the latter act of bankruptcy.

*Cross*, Serjt. one of the defendant's counsel, wished to look at the depositions under the commission.

*Pell*, Serjt. objected, that the learned Serjt. had only a right to look at those depositions which were already in evidence, and not the whole of them.

BURROUGH, J.— Those in evidence are all that can be read by the defendant's counsel. A demand of the goods on the part of the assignees, and the defendant's refusal, were proved (b).

If the trading, &c. of a bankrupt is proved by the proceedings under the commission, the counsel for the opposite party have no right to look at any of the proceedings, but such as have been used for that purpose.

*Vaughan*, Serjt. for the defendant, contended, that if, on the occasion spoken to by the servant, Sloane, the bankrupt was denied, because he was busy, that would be no act of bankruptcy; and further, that the denial of a trader to a creditor was not an act of bankruptcy, if the trader at that time owed no debt, which could be a petitioning creditor's debt.

For the defendant, the bankrupt himself was called; but his evidence did not vary the case.

BURROUGH, J. in summing up, said, by a statute of James the First, it is enacted, that if any bankrupt has at the time of his bankruptcy any goods in his order and disposition, of which he is reputed owner, such goods shall pass to his assignees (c).

(b) The only depositions under the commission which were used in this case, were, to prove the trading, petitioning creditor's debt, and act of bankruptcy, under the 49 Geo. 3, c. 121. And certainly none of the other depositions could

be evidence in this case; for if the defendant wanted the evidence of any one examined before the commissioners, he must call him as a witness.

(c) This is enacted in the stat. 21 Jac. 1, c. 19, § 11, on which

If they thought the goods valued at £72 were in that situation, they would find a verdict for the plaintiff for that sum.

As to the alleged act of bankruptcy spoken to by Sloane, if the bankrupt was busy, and *therefore* denied himself, it is no act of bankruptcy. The petitioning creditor's debt is alleged to be due between October, 1821, and May, 1822; that, however, proves no more than a debt due in May; and certainly, as the defendant's counsel stated, that put

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section more actions are brought by the assignees of bankrupts than perhaps on any other. It is to the following effect:—" ' And for that  
" ' it often falls out, that many per-  
" ' sons, before they become bank-  
" ' rupts, do convey their goods to  
" ' other men upon good consider-  
" ' ation, yet still do keep the same,  
" ' and are reputed the owners  
" ' thereof, and dispose the same  
" ' as their own.'

" Then be it enacted, that if at  
" any time hereafter any person  
" or persons shall become bank-  
" rupt, and, *at such time as they*  
" *shall so become bankrupt*, shall,  
" by the consent and permission of  
" the true owner and proprietary,  
" *have in their possession, order,*  
" *and disposition*, any goods or  
" chattels, *whereof they shall be*  
" *reputed owners*, and take upon  
" *them the sale, alteration, or dis-*  
" *positions as owners*, that in every  
" such case the said commission-  
" ers, or the greater part of them,  
" shall have power to sell and dis-  
" pose the same, to and for the be-  
" nefit of the creditors which shall  
" seek relief by the said commis-  
" sion, as fully as any other part  
" of the estate of the bankrupt.

The case of *Mace v. Cadell*, Cowp. 232, decides, that to come within this clause, the goods need not have been originally the bankrupt's property, and that it extends to all goods that the owner allows the bankrupt to use as his own.

The right of the assignees attaches to all goods in the bankrupt's possession and ordering, at the time of his bankruptcy, unless some circumstance appears to take the particular case out of the reach of the statute:—As that the bankrupt had them as executor or factor, or goods in the temporary custody of the bankrupt, or where property has been delivered to the vendee as amply as the case admitted, or where the bankrupt has the possession of the goods for a special purpose only, or where a bankrupt, living with his wife, has possession of the separate property of the wife settled before marriage in trustees for her separate use; and perhaps in some other special cases.

And in *Ryal v. Rolle*, 1 Wils. 260, it was resolved, that *choses* in action passed to the assignees, under the statute of James, the same as goods.

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an end to the act of bankruptcy at Christmas, 1821. But when I was a commissioner of bankrupts, we always, under an order of Lord *Loughborough*, put a schedule to the deposition, to show the exact time when the petitioning creditor's debt accrued: but that has not been done in this case (*d*).

As to the goods valued at £150, the father, after his son's failure, put him into business as his servant, in a house furnished at his expense. If the son was *really* his servant, those goods cannot be recovered by the assignees. As to the bills, I think the case is not made out; but as to the £72, I think it is.

Verdict for the plaintiff, damages £72.

*Pell and Lawes, Serjts. and Comyn, for the plaintiff.*

*Vaughan and Cross, Serjts. and Hutchinson, for the defendant.*

[Attornies—*Searle and Bland.*]

Dec. 6th.

SELLS v. HOARE, GOODWYN, & al.

Action on the Statute of Marlbridge for an excessive distress.

**THIS** was an action on the case against the defendants for taking an excessive distress.

The first count of the declaration stated that the plaintiff, after the making of a certain act of Parliament, intituled, "an act for enabling the sale of goods distrained for rent, in case the rent be not paid in a reasonable time," and before, and at the time of committing the grievance

(*d*) It often happens, that when commissions are at Guildhall, that if the petitioning creditor's debt is for goods sold, the commissioners annex the bill of parcels to

the deposition, which, of course, shews the date of the debt. But there are many such depositions without it.

next mentioned, held a certain messuage situate in the parish of St. James, Clerkenwell, in the county, &c., as tenant thereof to the defendants; under, and by virtue of a certain demise, made by the defendants before, &c.— Yet the defendants not regarding the said *statute*, but contriving, &c., on &c., wrongfully, &c., seized, took, and distrained, &c., divers goods, *and injuriously sold and disposed of the same*: whereas in truth and fact, at the time of making the said distress, *the said rent was not in arrear (a)*.

The second count omitted all mention of any statute, stated a tenancy as before, and that defendants maliciously pretending that a large sum, to wit £95, was due for rent, maliciously seized other goods, *a small part only of the said rent, to wit 1l. 3s. being due; which goods the defendants injuriously sold (b)*.

The third count was like the second, only it particularly set out the articles seized, and stated that at the time of the distress a small part, to wit, a hundredth part of the goods seized, would have satisfied the rent due (c).

(a) This count is framed on the statute 2 W. & M. sess. 2, c. 5, § 5, for distraining *and selling* goods for pretended rent due, when in reality no rent is due. That statute enacts. "That in case any distress and sale shall be made by virtue or colour of this act, for rent pretended to be in arrear and due, when in truth no rent is arrear or due to the person or persons distraining, or to him or them in whose name or names, or right, such distress shall be taken as aforesaid, that then the owner of such goods or chattels *distrained and sold* as aforesaid, his executors or administrators, shall and may by action of trespass, or upon the case, to be brought against the

" person or persons so distraining  
" any or either of them, his or  
" their executors or administrators, recover double of the value of the goods or chattels so  
" distrained and sold, together  
" with full costs of suit."

It should be observed that to support a count on this clause there must have been a *distress and sale*, no rent being due.

(b) This second count for maliciously distraining for more rent than is due, is a count at common law.

(c) The third count, for taking an excessive distress, is founded on the statute of Marlbridge, 52 Hen. 3, c. 4, which enacts that, "distresses shall be reasonable and not too great."

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The fourth count was in trover. Plea—Not guilty (*d*).

In support of this declaration, the plaintiff's counsel put in a notice of distress, dated the 30th of May, 1819; stating the distress to be for £95, rent in arrear, to Messrs Goodwyn, for the Coach and Horses public house, in St. John Street Road.

A witness named Manning proved that he had called on Mr. Goodwyn, one of the defendants, and stated to him that his people had seized Sells's goods, for £95, though the rent was only £65 a-year; and that though Sells had had it three years, he had regularly paid £50 a-year to Mr. Goodall, the ground landlord, so that on that account there could be but £45 due, and that, by the direction of Messrs. Goodwyn, Sells had expended £43 in repairs; so that instead of £95, the sum distrained for as being due, about £2 was the whole sum due from Sells to Messrs. Goodwyn. The witness further stated that Mr. Goodwyn admitted the whole of this to be true; but said that they had heard that Sells conducted the house so that the license was in danger, and they were determined to get him out at all events.

In his cross examination, by *Vaughan*, Serjt. he said he had been sworn on the New Testament, and believed it (*e*); he had been educated a Jew, but had changed his religion, though he still had a seat in the Synagogue.

*Vaughan*, Serjt. then wished to ask him if the £43 for repairs had not been demanded in a former action.

*Taddy*, Serjt. objected, that that could only be shown by the record.

(*d*) The count in trover is added in all actions on the case, where there has been either an unlawful taking or detaining of goods.

(*e*) Questions to a witness with regard to his religious belief, if

put with a view to show him incompetent as a witness, must be put before he is sworn in chief; questions like those asked in the principal case only go to his credibility.

*Vaughan*, Serjt. said, he should produce the record in due time.

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 Sells  
 v.  
 Hoare,  
 & Others.

BURROUGH, J.—Held, that as the plaintiff's counsel had gone into evidence of the repairs, the defendant's counsel had a right to ask this, to explain it.

Mr. Goodall, the ground landlord, proved that Sells had paid him the ground rent, £50 a-year, regularly, as it became due.

A witness named Mills valued the goods in the house before the seizure; and the inventory given to the plaintiff by the distress-broker being put into his hand, he said that the goods mentioned in that were worth £200. The witness compared that paper with an inventory book he had made at the time of his valuation.

*Pell*, Serjt. having looked at the book, contended it ought to be stamped.

BURROUGH, J.—Said, that, as a list of goods, it need not, and that the witness put a value on the articles from memory (*f*).

A witness proved the distress being taken; and the distress-broker's inventory was now read.

*Pell*, Serjt. contended, that the first and second counts could not be supported, for they alleged an injurious sale. No such thing having been proved, they must fail; besides it is not shown how the distress was put an end to,

(*f*) By the stamp act, 55 Geo. 3, c. 184, there must be a stamp on all appraisements and valuations of any estate or effects real or personal, except appraisements and valuations made under an order of

the court of admiralty, or for the purpose of the legacy duty. But such a book as the one produced contains no sums or values, but only a list of articles.



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and before such an action as this can be brought, the distress must have been completed. If a person takes a distress wrongfully, and does no more, he may be treated as a trespasser, but not sued on the statute of Marlbridge.

BURROUGH, J.—I think that statute will not reach any thing but a complete distress; but here is a count in trover, and if the taking was wrongful, the trespass may be waved; and the plaintiff may go on the count in trover.

*Taddy*, Serjt.—The third count is for taking an excessive distress, and it cannot be material, under the statute of Marlbridge, whether the distress was sold, or not, as at the time of the passing that statute no distress could be sold.

*Vaughan*, Serjt. in addressing the jury for the defendant, stated, that in a former cause the £43 for repairs had been recovered; and that the sums paid to the ground-landlord had been written off the beer account that Sells had with the defendants, at Sells's own desire; he could not be allowed for it twice over, therefore £95 were due. However, after the distress, the plaintiff agreed with the defendants, and consented to give up the house, on being paid by them for good-will £100, for his furniture £252; and his allowing them for rent, and their debt for beer. That was carried into effect by a broker on his part, and one on theirs; the plaintiff then received the balance, a sum of 209*l.* 18*s.* for which he gave a receipt, and was quite satisfied. In answer to the count in trover, the learned Serjeant said, he would put in a letter from the plaintiff to the distress-broker, desiring him to keep possession of the goods.

The Nisi Prius record of the former cause, was put in; it was produced by a clerk from the Common Pleas Office; it was between both the same parties, the declaration con-

tained only the common counts in assumpsit, for goods sold, &c.; and a verdict for the plaintiff was indorsed on it.

The defendant's attorney then proved the plaintiff's attorney's signature to a bill of particulars given in that action; one item of it was, repairs £43.

The letter from the plaintiff to the distress-broker was proved and put in; it was addressed, Mr. James White, and was in the following terms—

“ Sir,

“ I hereby desire you will keep possession  
 “ of my goods, chattels, and effects, which you distrain-  
 “ ed the 30th day of April last for rent due from me to  
 “ Messrs. Goodwyn and Co., in the place they now are,  
 “ being on the premises, the Coach and Horses, St. John  
 “ Street Road, Cerkenwell; and I will pay the man for  
 “ keeping the said possession. As witness my hand, this  
 “ 7th day of May, 1819. Rd. Sells.”

The broker who acted for the plaintiff, at the settlement of the accounts after the distress, was called; he stated that he valued, and made the account out, as above stated by Mr. Serjeant *Vaughan*, and he saw the plaintiff receive the balance, 209*l.* 18*s.* for which he gave a receipt. He appeared quite satisfied.

BURROUGH, J.—Put it to *Taddy*, Serjt. whether he could sustain the plaintiff's case.

*Taddy*, Serjt. The letter is only the usual notice given, to prevent a distress from being sold; and the ground rent could only be set off against the other rent.

A clerk of the defendants' proved, that the sums paid as ground rent were given credit for in the beer account, at the plaintiff's express request.

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*Vaughan*, Serjt. then offered evidence of the bad manner in which the public house was conducted; but—

BURROUGH, J.— Held it clearly inadmissible (*g*).

Three witnesses stated, that they would not believe the witness Manning on his oath (*h*).

*Taddy*, Serjt. replied.

BURROUGH, J.— Told the jury that the accounts having been settled after the distress, any right of action the plaintiff had previously for any thing about the distress, must be considered as waved or settled for in that compromise, and if they thought the ground rent had been applied to the beer account at the plaintiff's own request, he had had the benefit of it in the manner he wished, and the repairs had been given by the former verdict. On these grounds the defendants were, he considered, entitled to a verdict.

Verdict for the plaintiff, damages 1s.

The Judge certified under the statute of Queen Elizabeth (*i*).

(*g*) This evidence certainly could have nothing to do with the legality or illegality of the distress, the only question to be tried in this action.

(*h*) It very often happens, that witnesses are called to swear that they would not believe a person, called by the opposite party, on his oath; they are asked how long they have known him, and whether they would believe him on his oath; if they say they would not believe him, the other party

are at liberty to ask what are the grounds of such opinion. But it is very imprudent to ask this, unless you are certain that they know little that is prejudicial to him, or else you will not only have it proved that they would not believe him, but that he has been guilty of crimes and misconduct which will not raise his credit with the jury.

(*i*) By the statute 43 Eliz. cap. 6, § 2, it is enacted, "If upon any *action personal* to be brought "in any her Majesty's courts at

*Taddy, Serjt. and Storks, for the plaintiff.*

*Vaughan and Pell, Serjts. F. Pollock, and Andrews, for the defendants.*

[Attornies—*Goddard and Hutchinson.*]

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“ Westminster, not being for any  
“ title or interest of land, nor  
“ concerning the freehold or in-  
“ heritance of any lands, nor for  
“ any battery, it shall appear to  
“ the Judges for the same court,  
“ and so signified or set down by  
“ the Justices before whom the  
“ same shall be tried, that the  
“ debt or damages to be recover-  
“ ed therein in the same court  
“ shall not amount to the sum of  
“ forty shillings or above: that in  
“ every such case the Judges and  
“ Justices before whom any such  
“ action shall be pursued, shall  
“ not award for costs to the par-  
“ ty plaintiff any greater or more  
“ costs than the sum of the debt  
“ or damages so recovered shall  
“ amount unto, but less at their  
“ discretions.”

The certificate under this act goes to deprive the plaintiff of costs, whereas all certificates under other acts give costs to the plaintiff; and a certificate under this act takes away costs in all cases (but those above excepted), where the damages are under forty shillings; though under other acts the plaintiff would be entitled to full costs. The case of *Walker v. Robinson*, 1 Wilson 94, was an action of trespass for stopping the plaintiff's waggon and taking away a cart-rope; this the defendant justified as a distress for toll, due to the corporation of Doncaster. The

jury found for the plaintiff damages eighteen-pence. BURNET, J. who tried the cause, certified under this statute to deprive the plaintiff of his costs, his certificate written on the *postea* was in these terms—

“ I do hereby certify that the  
“ damages to be recovered in this  
“ action do not amount to forty  
“ shillings, but to one shilling and  
“ sixpence, and no more.”

It was contended that as there was an asportation, the plaintiff was entitled to full costs; and also, as the trespass was justified, it was admitted to be wilful, and on that ground he was entitled to full costs. LEE, C. J. and the rest of the court of King's Bench, held that as this case did not come within the exceptions of this statute, the certificate deprived the plaintiff of full costs. But either the asportation or the justifying the trespass would have entitled the plaintiff to full costs, if there had been no certificate under this statute.

It is rather singular that, though this statute was made in Queen Elizabeth's reign, it was never acted on till the year 1744; when, in the case of *White v. Smith*, mentioned in 2 Str. 1232, WILLES, C. J. granted such a certificate in an action for taking sand on Hounslow Heath. At the present day, however, it is granted very frequently.

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Dec. 8th.

SCHOLEY v. GOODMAN.

Agreements by husband and wife to live separate are legal. If you intend to set up adultery to avoid such agreement you ought to plead it. If the parties live together after the agreement, that will put an end to it. The wife's conduct towards her husband on coming back, is evidence on action by her trustee for the separate maintenance.

**THIS** was an action of assumpsit. The first count of the declaration stated, that there had been differences between the defendant and his wife, which still continued to exist, and that on, &c. at, &c. a certain agreement was entered into between the defendant, of the first part; his wife, of the second part; and the plaintiff, of the third part. The declaration went on to state the substance of that agreement; which was, that the defendant and his wife should live separate, and the defendant be indemnified by the plaintiff, for all charges he might incur on his wife's account, and the defendant agreed to pay the plaintiff 12s. weekly, for the support of the wife. The declaration also stated the other clauses of the agreement; and that, in consideration the plaintiff would fulfil the said agreement on his part, the defendant undertook, &c. to perform the said agreement on his part. And although the defendant and his wife have lived separate, and the plaintiff and she have performed their parts of the said agreement, the plaintiff saith that divers large sums, &c. are in arrear, according to the said agreement, yet the defendant not regarding, &c. but contriving, &c. did not pay, &c. but hath wholly refused, &c. Other counts were, *indebitatus assumpsit* for board and lodging, &c. supplied to the wife at his special instance and request; a *quantum meruit* for the board and lodging; and the common money counts, omitting all mention of the wife. Plea—General issue.

This case had been originally tried at the sittings after Michaelmas term, 1822, before DALLAS, C. J. when a verdict was given for the defendant, on the ground of the adultery of Mrs. Goodman.

A new trial was subsequently ordered, on the ground that the Lord Chief Justice had admitted the declarations of the wife, Mrs. Goodman, as evidence of the adultery. This species of evidence the Court were of opinion was inadmissible. The cause, therefore, came now to be tried a second time.

On the part of the plaintiff the agreement was put in, (it was not under seal, and therefore was a mere agreement in writing). The execution was admitted.

It was between the defendant, of the first part; Jane Goodman, his wife, of the second; and the plaintiff, of the third part. It recited that differences had taken place between the defendant and his wife, which were likely to continue, and that the defendant had agreed to allow his wife 12s. a-week, and the plaintiff was to keep him indemnified from all charges on her account, so long as the 12s. a-week were paid. The parties then agreed that the said Jane Goodman and her husband should live separate, and that she should be and reside with such persons, and at such places, as she should think fit, wholly freed from the authority of her husband, in all respects, as if she were sole and unmarried; the defendant then agreed to pay the plaintiff 12s. weekly, for the use of his wife: and the plaintiff agreed to save him harmless as to her; and that the husband and wife should not molest each other in any way, or bring any suit in the Ecclesiastical Courts. And for the performance of these conditions, each party bound himself to the other in the penal sum of £500. This agreement was dated on the 12th of October, 1821.

A witness proved that the defendant told him, he had paid £12 under the agreement, but would pay no more.

Another witness named Stringfield proved, that in the month of June, 1822, the defendant came to ask his advice, as to whether he had better continue the payment under the agreement; the witness stated that he advised him to do so, and that the defendant said he would send th money.

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*Vaughan*, Serjt. now contended that the plaintiff should be nonsuited, because agreements like this were void in law.

BURROUGH, J.—I am clearly of opinion, that this agreement is perfectly legal and good.

*Vaughan*, Serjt. then addressed the jury, and contended that he was entitled to a verdict, on the ground of the adultery of Mrs. Goodman: and also, that after the agreement, the defendant and his wife had slept together, which put an end to agreements like this, and was known in civil law under the name of Condonation.

On the defendant's counsel calling a witness to prove the adultery—

BURROUGH, J.—Said, I think adultery cannot be given in evidence in this case. The agreement is, that the plaintiff shall indemnify the husband against all demands on account of the wife. If adultery is to be set up, you must prove notice of it, and it should have been pleaded specially.

*Comyn* submitted that it need not; for that, where, in actions for goods sold to the defendant's wife, her elopement is set up as a defence, it is constantly given in evidence under the general issue.

BURROUGH, J.—There, there is no contract; but here, there is a good contract, which is to be avoided: it must be pleaded specially.

The defendant's counsel then offered to prove adultery, and notice of it, to the plaintiff.

BURROUGH, J.—Adultery ought to be pleaded: from

the conferences I have had with my Lord Chief Justice and my brothera, on former occasions, I am clearly of that opinion.

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*Vaughan*, Serjt. then contended, that the condonation, by taking the wife back after the agreement, put an end to it.

BURROUGH, J.—You may go into that.

The defendant's counsel then called his daughter, who proved, that in the month of January, 1822, the wife came to the defendant's house; and, there being a card party, she acted as mistress of the house.

*Vaughan*, Serjt. objected to what the wife said on this occasion being received in evidence.

BURROUGH, J.—Her conduct on her return is clearly evidence.

The witness then stated that the defendant and his wife slept together that night, but the wife went away in the morning: she came for the night, and went away in the morning, on two or three other times afterwards.

Two other witnesses confirmed this evidence, but carried the case no further.

*Pell*, Serjt. replied.

BURROUGH, J.—In summing up, observed, that if the case stood on the agreement alone, that would be put an end to by the defendant subsequently receiving back his wife, and sleeping with her, by the condonation as it is termed; but, according to the evidence of Stringfield, the defendant considered himself bound by the agree-



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ment, and recognized it so late as June, 1822; and that was long subsequent to the supposed condonation, which was in January 1822. His lordship therefore thought the plaintiff entitled to a verdict.

Verdict for the plaintiff, damages £10.

• *Pell*, Serjt. and *Curwood*, for the plaintiff.

*Vaughan*, Serjt. and *Comyn*, for the defendant.

[Attornies—*Besant* and *Drew*.]

Dec. 8th.

LEVY v. EDWARDS.

If a constable is preventing a breach of the peace, and any person stands in his way with intent to hinder him from doing so, the constable is justified in taking such person into custody, but not in giving him a blow.


**THIS** was an action against the defendant for assaulting, beating, and imprisoning the plaintiff. The second count was for a common assault. Plea—Not Guilty.

It was proved on the part of the plaintiff, that on Sunday the 25th of August, 1822, he was walking through Stepney fields, where there had been a fight between two boys, which the defendant, and two others who acted as constables, had just put a stop to; and the defendant was handcuffing one of the boys, when the plaintiff civilly said to him, “you have no right to handcuff the boy;” when the defendant gave the plaintiff a blow with his stick, and took him to the Whitechapel watch-house, where he detained him an hour, till he was bailed by his friends; and that Sir Daniel Williams, on the parties going before him the next morning, dismissed the case. It appeared that before him nothing was taken down in writing.

The charge-book from the watch-house was produced by the defendant’s attorney, pursuant to notice: it con-

tained a charge against the plaintiff of insulting the defendant in the execution of his office.

A notice to the defendant, signed by the plaintiff's attorney, demanding perusal and copy of any warrant under which he acted, was proved (a).

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(a) By the statute 24 Geo. 2, c. 44, no action shall be brought against any constable, headborough, or other officer, or any acting by his order, or in his aid, for any thing done under a justice's warrant, unless a demand of the perusal and copy of such warrant has been made or left at the usual place of his abode, by the party, or his attorney or agent, in writing, signed by the party demanding the same; and the same refused or neglected for six days after demand. And in case of compliance, by showing it, and permitting a copy to be taken by the party demanding, on action brought, without joining the justice, the warrant shall justify the officer, &c., notwithstanding want of jurisdiction in the justice; and if the justice is joined, a verdict shall be given for the constable; and if the verdict is against the justice, he shall pay the plaintiff the amount of the constable's costs. It has been decided, that if the demand of perusal and copy has not been complied with within the six days, if it is complied with before the action is brought, it is sufficient. The statute only extends to actions of tort.

This demand is not necessary where the officer has no warrant, or for so much as he has exceeded his warrant: but it is prudent always to make such demand, which

is good, if signed by the plaintiff's attorney instead of the plaintiff. This demand is best proved by proof of a duplicate original, or it may be proved by a copy or other secondary evidence, if notice has been given to the defendant to produce the original.

By the same act, all actions against constables must be commenced within six calendar months after the act done; and this is so, whether the constable has exceeded his authority or not, and applies to all cases where he acts as constable. However, I should observe, that by several acts of parliament, constables acting in pursuance of *those* acts must be sued within three calendar months. This makes it necessary for the plaintiff to prove that the action was commenced within time: this may appear on the face of the record, if not, other proof must be given of the latitat bill of Middlesex, or capias, and of the time of suing it out, the *teste* not being sufficient proof of the time when it was sued out; because the *teste* of latitats sued out in term is the first day of the term; of those in vacation, the last day of the preceding term. I think it is also necessary to prove, that the fact complained of took place in the county where the venue is laid; for, by the statute 21 Jac. 1, c. 12, § 5, it is enacted, "That if any action, bill, plaint,

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And the writ sued out in this case was also put in to show at what time the action was commenced.

*Pell*, Serjt. contended, that the plaintiff must be nonsuited, because the writ was served on the 27th of November, 1822, and the affair happened on the 25th of August; and he contended, that persons assisting at a fight were idle and disorderly persons, within the vagrant act, 3 Geo. 4. c. 40.

“ or suit upon the case, trespass, battery, or false imprisonment, shall be brought against any justice of peace, mayor, or bailiff of city, or town corporate, headborough, portreve, constable, tithingman, collector of subsidy or fifteenths, churchwardens, or persons called sworn-men, executing the office of churchwarden or overseer of the poor; and their deputies, or any of them, or any other which in their aid or assistance, or by their commandment, shall do any thing touching or concerning his or their office or offices, for or concerning any matter, cause, or thing by them or any of them done by virtue or reason of their or any of their office or offices, that the said action, bill, plaint, or suit, shall be laid within the county where the trespass or fact shall be done and committed, and not elsewhere: and that if upon the trial of any such action, bill, plaint, or suit, the plaintiff or plaintiffs therein shall not prove to the jury which try the same, that the trespass, battery, or impri-

sonment, or other fact or cause of his, her, or their, such action, bill, plaint, or suit, was or were had, made, committed, or done within the county wherein such action, bill, plaint, or suit shall be laid, that then in every such case, the jury which shall try the same, shall find the defendant and defendants in every such action, bill, plaint, or suit, not guilty, without having any regard or respect to any evidence given by the plaintiff or plaintiffs therein, touching the trespass, battery, imprisonment, or other cause for which the same action, bill, plaint, or suit is or shall be brought.”

I thought it right to state this clause at large, as no mention is made of these provisions, or of this proof being necessary in several of the best books on this subject. The same section allows these officers to give special matter in evidence, under the general issue, and gives them double costs if successful. Constables are not entitled to notice of action as justices and revenue officers are, but only to the demand before mentioned.

BURROUGH, J.—Was clearly of a contrary opinion, but thought that as to handcuffing the boy who had fought, and taking him to the watch-house, the constable was justified.

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For the defence, it was proved by the two other constables, that when the defendant was taking the boy to the watch-house, the plaintiff placed himself before him to prevent his doing so.

BURROUGH, J.—There can be no doubt that the constables were right in stopping the fight, and would be justified in apprehending any one who aided or abetted those who fought; but it did not appear that the plaintiff did either. If they thought that as the defendant was apprehending the boy, the plaintiff placed himself before the defendant to hinder him from doing so, that would justify the defendant in detaining the plaintiff at the watch-house, but not in beating him; but if the plaintiff only said “you have no right to handcuff the boy,” the defendant was clearly a wrong doer as to the whole.

Verdict for the plaintiff on the whole declaration—  
Damages, 40s.

*Vaughan*, Serjt. and *Curwood*, for the plaintiff.

*Pell*, Serjt. and *Comyn*, for the defendant.

[Attornies—*Jones* and *Smith*.]

1823.

*Adjourned Sittings after Mich. Term, in London.*

BEFORE MR. JUSTICE BURROUGH.

Dec. 10th.

MAY and Ors. v. MAY and Ors.

If money is paid by two persons for the benefit of a third, where they ought to bring a joint action for the whole sum, and where each a separate action for the sum he has advanced.  
—Quære.

**THIS** action was brought by the plaintiffs to recover the sum of £446, paid by the plaintiffs as bail in error for the defendants. To make up this sum of money, each of the plaintiffs advanced his share.

*Vaughan*, Serjt. contended, that separate actions ought to have been brought by each of the plaintiffs, because the money paid was the money of each, and there could not be a joint action unless it were paid from a joint fund.

BURROUGH, J.—Overruled the objection, and was of opinion, that as the plaintiffs made the payment to the defendants in error, in one sum, and as a joint payment, this action could be maintained in its present form.

Verdict for the plaintiffs for £446.

BEFORE GIFFORD, C. J., PARK, AND BURROUGH, JS.  
In Bank.

Jan. 25th.

*Vaughan*, Serjt. now moved for a rule to shew cause why a new trial should not be had, on grounds similar to

In *Osborne* and another v. *Harper*, 5 Ea. 225, the plaintiffs and the defendant had been partners; and after the dissolution of their partnership, the defendant drew a bill in their joint names. The

those of his objection at the trial, and cited *Osborne v. Harper*, 5 East 225; and *Brand v. Boulcot*, 3 Bos. & Pul. 235.

1823.  


GIFFORD, C. J. — Observed, that it was a nice point.

The Court granted a rule to show cause.

*Pell*, Serjt. and *Holt*, for the plaintiffs.

*Vaughan*, Serjt. and *Hutchinson*, for the defendants.

[Attornies—*Boxer* and *May*.]

other parties to the bill were ignorant of the dissolution of the partnership; and the holder brought an action against all three. Harper pleaded his bankruptcy, and a *nolle prosequi* was entered as to him but against the two plaintiffs; a verdict passed for £1156. The two plaintiffs were never partners after the dissolution before mentioned; but their attorney proved that he had discharged the whole demand £1156, at the request of both the plaintiffs. The case was much discussed as to whether each plaintiff should not have brought a separate action for his share: but on an affidavit being produced (by direction of the Court) that the attorney advanced the money

on the joint credit of both the plaintiffs, the Court held that it was a joint fund from which the payment was made, and a joint action was therefore maintainable. In *Brand* and another v. *Boulcot*, 3 Bos. & Pul. 235, the plaintiffs and defendant had been joint assignees, under the bankruptcy of T. L. The solicitor's bill was £208: each of the plaintiffs paid him £104, and brought this joint action against the defendant, the other assignee, for his share. Lord Alvanley at the trial nonsuited the plaintiffs, on the ground that each should have brought a separate action; and on motion for a new trial, the Court of Common Pleas were of the same opinion.

1823.

Dec. 10th.

LEE v. JOSEPH.

Practice.

**THIS** case was taken as an undefended cause, and a verdict was taken for the plaintiff.

Jan. 25th.

*Vaughan*, Serjt. now moved for a new trial on the affidavit of the defendant's attorney, who stated that he had not delivered his briefs, conceiving the cause to stand thirty-five off; but twenty-nine of those before it were special jury causes, and so were passed over. The learned Serjeant moved it on payment of costs and giving judgment of the term.

The Court granted a rule to show cause.

In the cause list of these sittings the first 24 cases were special jury causes.—(*Remanent*).!

Dec. 11th.

**SANDERSON** and al. Assignees of Barge, a Bankrupt, v. **LAFREST** and al.

Denial to a collector of king's taxes is as much an act of bankruptcy as denial to any other creditor. A bankrupt can never be a witness to prove his own act of bankruptcy. Whether a letter written by him, within a few days after the supposed act of bankruptcy is evidence. —*Quære.*

**TROVER** for wines. The first count of the declaration stated the conversion to be before the bankruptcy; and the second count stated it to be afterwards. Plea—Not guilty.

Notice had been given under the statute of disputing the petitioning creditor's debt, and the act of bankruptcy.

On the part of the plaintiff the commission was put in, dated April 16th, 1823, and the assignment.

A witness proved the bankrupt's hand-writing to an acceptance for £103, to a bill drawn by the petitioning creditor at six months, dated October 17th, 1822; this witness,

in his cross examination, stated that since the date of the bill, the bankrupt had paid the petitioning creditor sums amounting to several hundred pounds, and since that time the petitioning creditor had supplied him with goods to a considerable amount.

The act of bankruptcy was, being denied to a collector of king's taxes, on the 8th of March, 1823.

The seizure of the wines by the defendants under an execution after the act of bankruptcy, but before the commission, was admitted.

To prove the value of the wines, the bankrupt, who had obtained his certificate and released his assignees, was called; he stated their value to be £1700.

*Pell*, Serjt. contended that in case a verdict was given for the assignees, it ought only to be for the sum of £966, the sum for which the goods sold under the execution, as appeared by the sheriff's return.

*Taddy*, Serjt. observed, that on the sheriff's return, a large sum was allowed to the landlord for rent, and though a landlord in cases of executions is entitled to receive his rent, he is not entitled in case of a bankruptcy, unless he makes a distress, which was not done here. The common course in bankruptcies, is for the landlord to threaten a distress and get paid.

The plaintiff's counsel then put in a letter from the bankrupt, to the petitioning creditor, dated April 12th, 1823, acknowledging a debt of 47l. 12s, in addition to the bill before mentioned.

*Pell*, Serjt. objected that this letter, being written after the act of bankruptcy, could not be evidence to support the commission.

*Taddy*, Serjt. Declarations by a bankrupt after act of

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 & al.

bankruptcy, and before commission issued, are often received.

*Pell*, Serjt. Certainly, on other matters, but not to prove the petitioning creditor's debt; the trading, or the act of bankruptcy.

BURROUGH, J.—A bankrupt can never be a witness to prove his own trading, or an act of bankruptcy committed by himself, or the petitioning creditor's debt; but I shall admit this letter in evidence, being written before the commission issued, though after the act of bankruptcy, as the question of such letters being admissible is now pending in the Court of Exchequer.

Verdict for the plaintiff, with liberty to enter a nonsuit on this point.

*Vaughan* and *Taddy*, Serjts. and *F. Pollock*, for the plaintiffs.

*Pell*, Serjt. for the defendants.

[Attornies—*Gale* and *Wilde*.]

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BEFORE GIFFORD, C. J., PARK AND BURROUGH, JS.  
 In Bank.

Jan. 25th.

*Pell*, Serjt. now moved to enter a nonsuit, and contended that this letter ought not to have been admitted in evidence, and without it there was no proof of any petitioning creditor's debt. The letter was *dated* before the commis-

The case of *Jeffs v. Smith*, 2 Taunt. 401, decides, that being denied to a tax collector, is an act of bankruptcy, exactly as denial to any other creditor would be. In the case of *Robson v. Kemp*, 4 Esp. 233, the act of bankruptcy relied on was the execution of a fraudulent assignment; Lord ELLENBOROUGH refused to admit in

sion, but that was no proof that it was written before. He cited the case of *Hobson v. Kemp*, 4 Esp. 233, and *Brett v. Levitt*, 13 East, 213, and mentioned that the point was now under consideration in the Exchequer, in a case tried at Salisbury, where HULLOCK, B. refused to admit the declaration of a bankrupt made before the commission, but after the act of bankruptcy.

1822.  
SANDERSON  
& al.  
Assignees of  
Barge, a  
Bankrupt,  
v.  
LAFEREST  
& al.

The Court granted a rule to show cause.

### EVANS v. YEATHARD.

Dec. 12th.

**ASSUMPSIT** for the value of ten chaldrons of coals.  
Plea—General issue.

The delivery of the coals, and the price, were admitted by the defendant's counsel.

Semble, that a witness is competent to prove that a debt due jointly to him & the plaintiff is paid.

*Vaughan*, Serjt. for the defendant, opened, that the defendant and a Mr. Follet were partners, and that the plaintiff owed them a debt of £80, for which he had given a bill, and that a day or two before the bill was payable, the

evidence a declaration of the bankrupt, after the execution of the deed, that it was fraudulent.

In *Brett v. Levitt*, 13 East, 213. the petitioning creditor's debt was two bills of exchange, of which the bankrupt was drawer: no notice of dishonour had been given him, but it was proved that after the act of bankruptcy, he said that he knew the bills must come back. *Peake* moved for a new trial, on the ground that this declaration was inadmissible, as made after

act of bankruptcy; but the Court of King's Bench decided that it was rightly admitted, and cited the case of *Downton v. Cross*, 1 Esp. 168, where the acknowledgment of the bankrupt, after act of bankruptcy, was the only evidence of the petitioning creditor's debt; and there Lord Kenyon ruled that the bankrupt's declaration at any time before the suing out of the commission would be sufficient evidence of the petitioning creditor's debt.

1828.  
 EVANS  
 v.  
 YEATHARD.

plaintiff asked them to take coals for it; and that the coals in question were delivered on that arrangement being come into.

To prove this he called Mr. Follet.

*Pell*, Serjt. objected to the competency of Mr. Follet, on the ground of interest, and contended that, coming to prove that the defendant received them on their joint account, by his testimony he is enabled to have a payment made and applied to himself and partner.

*Wylde*. If by the witness's evidence the defendant obtains a verdict, the defendant must account to Follet for half the amount of the coals, as goods received on the partnership account; but if the defendant loses, Follet would receive nothing.

*Vaughan*, Serjt. *contra*. Mr. Follet comes to prove that a debt due to himself and his partner is paid: so far he comes to prove what is against himself.

*Comyn*. If the defendant obtains a verdict, it is said that it would give him a claim on his partner; but what he says now, would not be evidence on such a claim, either for him, or against the defendant. No witness ever was rejected because he came to prove that a debt due to himself was paid.

BURROUGH, J.—I do not see how the present verdict could be used, either for or against the witness; but if the witness says that the debt due partly to himself is paid, such admission would be indeed evidence against him. I cannot see why he is not admissible.

Mr. Follet was then examined.

Verdict for the defendant.

*Pell*, Serjt. and *Wylde*, for the plaintiff.

*Vaughan*, Serjt. and *Comyn*, for the defendant.

1823.  
EVANS  
v.  
YEATHARD.

[Attornies—*Van Sandau* and *Walker*.]

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BEFORE GIFFORD, C. J., PARK, AND BURROUGH, JS.  
In Bank.

*Pell*, Serjt. now moved for a new trial, on the ground  
that Follet's evidence was not admissible.

1824.  
Jan. 24th.

The Court granted a rule to show cause.

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[*Special Jury*].

COBBOLD v. CASTON.

1823.  
Dec. 15th.

**T**HIS was an action for a breach of contract, brought by the plaintiff, who resided at Ipswich, against the defendant, who was owner and master of the brig *Rigby*, for not delivering a quantity of coals which he had contracted to deliver at a certain stipulated price, whereby the plaintiff was obliged to buy other coals at a loss of £15, in difference of price.

It appeared in evidence, that these parties had made a bargain *by parol*, to the following effect—

That in consideration that the plaintiff would employ the defendant's brig, the *Rigby*, to take corn to Hull, he would bring back the quantity of coals at the stipulated price.

The plaintiff agreed by parol, that if the defendant would employ his ship to carry corn, he would bring him coals at a stipulated price. This contract is not within the statute of frauds and need not be in writing; nor is part delivery or part payment necessary to make it binding.

1823.  
 COBBOLD  
 v.  
 CASTON.

He was employed to take the corn, but never brought any coals. The £15 loss was also proved.

*Pell*, Serjt. contended, that this action could not be maintained. This is a contract to deliver coals at a certain price, no written contract being made, and no part delivery or part payment; therefore it fell within the statute of frauds. That was determined in the case of *Garbut v. Wulson*, (a).

*Vaughan*, Serjt. *contra*. This is not a contract for the sale of goods. In all the cases that have been determined to be within the statute, the vendor has had the goods; but this defendant's bargain was to bring the coals from Hull.

BURROUGH, J.—I do not think the cited case applies, because, there the property was in the defendant's hands at the time, but here the bargain was respecting goods that the defendant himself had to buy.

Verdict for the plaintiff, damages £15.

*Vaughan* and *Lawes*, Serjts. and *Patteson*, for the plaintiff.

*Pell*, Serjt. and *G. Marriott*, for the defendant.

[Attornies—*Montrieu* and *Nelson*.]

(a) 1 Dowling & Byl. 219.

1823.

## AKERMAN v. HUMPHERY.

Dec. 15th.

**TROVER** for hams and butter. Plea—General issue.

In this case a witness proved that a person named Dent, who lived near Richmond, in Yorkshire, was in the habit of consigning hams and butter to a person named Hutchinson, a provision-broker in London. Dent usually sent the goods by land carriage from Richmond to Stockton upon Tees, where they were by his direction shipped by Messrs. Wilkinson of that place, directed to Hutchinson in London. On the occasion in question, Dent sent by post to Hutchinson an invoice of the goods in question, 4 hogsheads of hams and 8 firkins of butter, at the price of 179*l.* 9*s.* 10*d.*

A consignor of goods delivering over to a third person the shipping note of such goods, and a delivery order on the wharfinger, to deliver such goods as soon as they arrive, does not pass the property in them so as to prevent a stoppage in transitu by the consignor.

This invoice, dated April 3d, 1823, was read; it was in Dent's hand-writing, and commenced—

“ Mr. Jas. Hutchinson,

“ Bought of George Dent.”

And was for the goods in question.

In another part of the same letter was an account current, of all the dealings of Dent and Hutchinson, and of the bills given by Hutchinson to Dent; the balance on this account, taking all the bills as money, was £5 in favor of Dent.

A shipping note sent by Wilkinson and Co. to Hutchinson concerning the goods in question, was next put in. It was in the following terms—

“ Stockton, April 5, 1823.

“ Mr. James Hutchinson,

“ Sir,

“ By order of George Dent *we ship for you,*  
 “ as below noted, on board the Durham, Rd. Greensides  
 “ Master, for Hays's Wharf, Southwark, London. Any

1823  
 AKERMAN  
 v.  
 HUMPHERY.

“ goods entrusted to our care you may depend on being  
 “ regularly forwarded.

We are your obedt. servts.



1 & 4, 4 Hhds. Hams. John Wilkinson, & Co.

W R. Wilkinson.



8 Firkins.

“ P. S. Mr. D. informs us he will have more goods  
 “ down early on Monday morning, which, if in time for the  
 “ above vessel, will endeavour to get them on board.

R. W.”

This shipping note was received by Hutchinson on the  
 8th of April.

On the 9th of April, Hutchinson received a loan of £150  
 from the plaintiff, on his giving the plaintiff the shipping  
 note and a delivery order (signed by his clerk by his au-  
 thority) on the defendant, in the following terms—

“ Proprietors of Hays's Wharf.—Please deliver to Mr.  
 “ John Akerman, or to his order, the following goods (on  
 “ arrival) by the Durham, Rd. Greensides, Mr., from  
 “ Stockton.

For Mr. Jas. Hutchinson.

J<sup>no</sup>. Johnson.



1 & 4, 4 Hdds. Hams.



8 Firkins of Butter.

“ *Ratcliffe Highway,*

“ 9th April, 1823.”

The ship arrived on the 16th of April, with the goods in question on board.

Another witness proved that, on the 21st of April, a person called at Hays's wharf, (the defendant's wharf), and demanded the hams and butter under the shipping note and delivery order. The defendant refused to deliver them, saying, that Hutchinson was insolvent.

Three witnesses proved, that in the provision trade bills of lading were not used, but these shipping notes instead; and the persons in the trade were accustomed to lend money on those notes and delivery orders.

*Vaughan*, Serjt. stated the defence to be, that no change of property took place by the delivery of the shipping note, and the order; and that, before the goods arrived at the defendant's wharf, Mr. Dent had ordered them to be stopped in transitu, on account of the insolvency of Hutchinson.

To prove the insolvency of Hutchinson, a letter from him to a Mr. Ray, dated April 5th, was put in; in that he confessed himself to be insolvent in pretty plain terms.

A commission of bankrupt against Hutchinson, dated Nov. 22, 1823, was put in.

A clerk of Messrs. Fry and Chapman, Hutchinson's bankers, proved that they began to dishonor his bills from the 20th of March, and they dishonored twenty-five of his bills in a few days.

A clerk of the defendant proved Dent's order to detain the goods on the 14th of April, two days before they arrived.

Mr. Dent having been released by the defendant from an indemnity he had given him, stated, that on the 14th of April, in consequence of two bills that Hutchinson had accepted in his favor being dishonored, and of Hutchinson telling him on that day that he should never pay another bill, he directed the wharfinger, (the defendant),

1823.

AKERMAN  
v.  
HUMPHRY,



1843.

AKERMAN  
v.  
HUMPHRY.

not to deliver them to Hutchinson, but to detain them for the witness's benefit. He also stated, that, from a number of bills that Hutchinson had accepted in his (witness's) favor being dishonored, Hutchinson owed him upwards of £500.

In his cross examination he admitted, that he had not taken up the bills that Hutchinson had accepted for these very goods stopped in transitu.

A witness proved, that, in the provision trade, there are constantly bills of lading, and that shipping notes are not considered of much accuracy, because, after they are dispatched, the sender often finds that he cannot send the goods by the ship mentioned in the shipping note, and is obliged to send them by another ship.

*Taddy, Serjt. in reply.* It is clear in the case of a bill of lading endorsed to a party, that the goods cannot be stopped in transitu, because the right to the property passed by the endorsement of the bill of lading; and the giving the shipping note and delivery order to the plaintiff, passed the property the same as an endorsement on a bill of lading would, because it is proved to be the usage of the trade by three witnesses to have no bills of lading, but these shipping notes instead. And the learned Serjt. contended, that there could in this case be no right remaining in Dent to authorise him to stop the goods in transitu, as the transitus from him was at an end on the goods arriving at Stockton; and that, to support a stopping in transitu, the person so stopping goods must take up the bills the consignee has accepted for those goods, otherwise the consignee does not get the goods, because they are stopped in transitu, and must pay the bills because he has accepted them.

BURROUGH, J.—I do not think that the giving the shipping note and delivery order to the plaintiff, made a change of the property; and I think the shipping note does not

amount to a bill of lading; a bill of lading is exactly like a bill of exchange, and the property it refers to, passes by endorsement on it, but not by delivery of it without endorsement. I do not think this shipping note, from the nature of it, is endorsible, and here, in point of fact, it is not endorsed; therefore, in my judgment, there was no change of property. As to the insolvency of Hutchinson, there could be little doubt of it. I do not think that Dent's not taking up the bills at all affects the case, because it is in evidence, that the price of these goods was no more than 179*l.* 9*s.* 10*d.*, and it appears in evidence that Hutchinson owed Dent £500. I think Dent was entitled to stop the goods in transitu on the 14th of April, as he did, and that therefore the defendant is entitled to a verdict.

1823.  
AKERMAN  
v.  
HUMPHERY.

Verdict for the defendant, with liberty for the plaintiff's counsel to move to enter a verdict for the plaintiff, if the court above should be of opinion, that the property was changed by the delivery to the plaintiff of the shipping note and delivery order, or that the transitus was at an end on the goods reaching Wilkinson, at Stockton.

*Taddy*, Serjt. and *Campbell*, for the plaintiff.

*Vaughan*, Serjt. for the defendant.

[Attornies—*Hutchinson* and *Pilcher*.]

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BEFORE GIFFORD, C. J., PARK AND BURROUGH, JS.  
In Bank.

*Taddy*, Serjt. now moved for a rule to show cause, why there should not be a new trial, when it was discovered Jan. 26th.

1824

AKERMAN  
HUMPHERY.

that no notice of the motion had been left at the Judge's chambers(a). The learned Serjt. therefore, not being entitled to move it, BURROUGH, J. said, that it was a point reserved at the trial. He would look at his note, and the learned Serjt. might mention it again.

Jan. 31st.

*Taddy*, Serjt. now renewed his application, and contended, that as Dent sent the goods by land carriage to Wilkinson, at Stockton upon Tees, the transitus of the goods was at an end as to him, on their arriving there; and that he, therefore, could not stop them afterwards on their way to London.

LORD GIFFORD, C. J.—Can it be contended, that, in every part of the journey to the consignee, Hutchinson, the consignor, may not stop them in transitu?

BURROUGH, J.—I think that justice has been done in this case.

LORD GIFFORD, C. J.—Brother *Taddy*, the Court is against you.

Rule refused.

(a) In the court of Common Pleas, it is necessary to give two days' notice at the chambers of the Judge

who tried the cause, of your intention to move for a new trial.

1823.

[*Special Jury.*]WOOD, assignee of HALL, *v.* WOOD.

Dec. 16th.

**TROVER** for cloth. On the part of the plaintiff, (after proof of the bankruptcy), it was proved that, at the time of his bankruptcy, the bankrupt had this cloth in his possession, he trading in that article; and that the defendant got it into his possession and would not give it up.

The usage of a trade must be certain and uniform, to make it binding on transactions in such trade.

The defence set up, was, that the defendant, who was the owner of the cloth, had sent these cloths to the bankrupt for inspection, and that he was, by the usage of the cloth trade to send an answer to the defendant whether he would buy them or not, and that if he did not in three days say that he would buy them, the seller, by the usage of the cloth trade, was to send for, and receive them back again.

To prove this usage of the trade several witnesses were called, all of whom spoke of a usage in the cloth trade to send goods for inspection; but some of them spoke of three days as the time, within which the buyer was to say whether he would buy them or not, others spoke of a week, and one of a month, as the time.

*Pell*, Serjt. in reply, relied on a case being made out, under the stat. of 21 James 1. c. 19, of reputed ownership in the bankrupt, and cited a dictum of LE BLANC, J. in which that Judge laid down, that if a trader has got goods in his possession, with the option of returning goods, but does not return them before he becomes a bankrupt, the goods will pass to his assignees, though they made no part of the bankrupt's stock.

BURROUGH, J.—If goods are in the hands of a bankrupt at the time of his bankruptcy, generally speaking they will go to his assignees under the statute of James, though

1822.

WOOD, Assign-  
ee of Hall,  
v.  
WOOD.

there is no pretence of any sale to the bankrupt, or that they are really his property. Special facts may take a case out of this general state of things. It has been contended that in the cloth trade there is a certain usage, relative to the return of cloth sent for inspection. Such a usage must, to be binding, be uniform and universal, and not merely the way of dealing at particular houses. It must be so universal that every one in the trade must be taken to know it. If it is not so, it is no usage at all. Here there seems to be no certain rule or usage, for the witnesses do not give it as certain or uniform; but if there be such a usage, I am of opinion that it would take the case out of the statute of James.

Verdict for the plaintiff, damages £141.

*Pell, Serjt. D. F. Jones, and D. Pollock, for the plaintiff.*

*Vaughan, Serjt. and Chitty, for the defendant.*

[Attornies—*Sweet and Tomlinson.*]

Dec. 16th.

PRICE v. MARSH and al

If an alteration has been made in the plaintiff's pass book with his bankers by some person at his bankers'; if he inquires there why it is done, the answer he receives from a person acting in the banking house as a clerk, is evidence in an action against the bankers.

**ASSUMPSIT** for money had and received, with the common money counts. Plea—General issue.

The plaintiff, it appeared in evidence, was a surgeon, and the defendants were his bankers, and this action was brought to recover £50, the alleged balance of his account in his favor. His servant proved the paying in 8*l.* 10*s.* in a check of 5*l.* 10*s.* and £30 in cash; and that on paying it in,

a clerk in the banking-house entered in a book, which the plaintiff always sent when he paid in money, 81*l.* 10*s.* as so much paid in. From the evidence of another witness, it appeared, that when this book was taken several months afterwards to the banking-house, on more money being paid in, the clerks erased the figure 8 in the entry of 81*l.* 10*s.* and altered it into 31*l.* 10*s.* saying that they had made what was wrong quite right; that the next day the plaintiff called at the banking house, and asked a person named Golightly, who was acting as a clerk there, whether they had made the alteration, and why?

*Pell*, Serjt. objected, that Golightly, not being a partner in the banking-house, nor a defendant on the record, what he said could not be evidence.

BURROUGH, J., held, that, as it appeared the alteration was made in the book at the banking-house, if the plaintiff asked a person who was acting as a clerk in the banking-house, and transacting the business there on behalf of the bankers, why an alteration of this kind had been made, his answer was certainly evidence.

His answer was then given in evidence.

The defence was, that the check of 31*l.* 10*s.* only, and no cash was paid in; and several witnesses were called for the defendants.

His Lordship left the case to the jury, on the question, was 81*l.* 10*s.* paid in or not.

Verdict for the plaintiff, damages £50.

*Vaughan*, Serjt. and *Talfourd*, for the plaintiff.

*Pell*, Serjt. for the defendants.

[Attornies—*Greenfield* and *Seymour*.]

1824  
PRICE  
v.  
MARSH  
& al.

BEFORE GIFFORD, C J., PARK AND BURROUGH, JS.  
In Bank.

Jan. 25th.

*Pell*, Serjt. moved for a new trial in this case, on payment of costs, on the ground that the verdict was against the weight of evidence.

But the Court refused the rule on the ground that the evidence, which was conflicting, had been left to the jury, and they could not say that the jury had come to a wrong conclusion.

1823  
Dec. 18th.

BODDY v. ESDAILE and Ors. Assignees of Trigge,

If a person sends his servant to sell his deals at another's wharf, these deals do not pass to the assignees of the owner of the wharf, as goods in his order and disposition, under the stat. 21 Jac. 1. c. 19.

**T**ROVER for deals. Plea—General issue.

The plaintiff was a timber-merchant in London; the defendants were the assignees of one Trigge, a bankrupt, who had kept a wharf at Hertford.

For the plaintiff, it appeared that the deals were his property, but he sent them to Trigge's wharf, and sent his servant named Weekes with them to look after them, and sell them as he could get customers; but Weekes always took the directions of Trigge as to whom he was to trust, and Trigge often found out customers.

For the defendants it was contended, that, under the statute of 21 James 1, c. 19, these goods passed to the assignees, as goods in the ordering and disposition of the bankrupt, at the time of his bankruptcy.

Evidence was given of the commission, and the petitioning creditor's debt, the trading, and act of bankruptcy, from the proceedings under the commission, no notice

having been given to dispute them under the statute 49 Geo. 3, c. 121. Evidence was also given, that Trigge gave orders respecting the sale of a part of the deals.

1823  
BODDY  
v.  
ESDAILE &  
Ors. Assignees  
of Trigge.

BURROUGH, J., told the jury, that if the plaintiff sent down his servant with the goods, and the bankrupt was only employed to find out customers, the bankrupt had no possession of the goods, and they would not pass to his assignees.

Verdict for the plaintiff.

*Taddy*, Serjt. for the plaintiff.

*Pell*, Serjt. for the defendants.

[Attornies—*Tomlinson* and *Hewit*.]

BEFORE GIFFORD, C. J., PARK AND BURROUGH, JS.  
In Bank.

*Pell*, Serjt. now moved for a new trial, on the ground of misdirection of the learned Judge, and that the verdict was against evidence; and contended that a complete case, under the statute of James, had been made out; for that, by the goods lying at Trigge's wharf, he obtained credit by them and if the sending a servant with goods, would prevent them passing to the assignees, there would be an end of all benefit from the statute of James.

1824  
Jan. 25th.

GIFFORD, C. J.—I conceive that the direction of the learned Judge was quite right. If the servant kept possession of the deals, it is clear that Trigge, the bankrupt,



1894

BODDY

v.

ESDAILE &  
ORS. ASSIGNEES  
OF TRIGGE.

never had them in his possession, and therefore they could not be within the statute of James.

PARK, J.—If the possession continued in Boddy, the plaintiff, he must recover; and I feel no doubt that the learned Judge was right, in the mode in which he left the case to the jury.

The Court granted a rule *nisi*, on the ground that the verdict was against evidence.

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## COURT OF KING'S BENCH.

*Adjourned Sittings after Mich. Term, at Westm.*

BEFORE LORD CHIEF JUSTICE ABBOTT.

Jan. 14th.

ARCHER v. BAMFORD.

Practice.—If a cause has been made a special jury cause, but the special jury have not been summoned, the Ld. Ch. J. will take it at the end of the day on which it would have been tried by the special jury, and not let it remain till all the special juries in the list are gone thro'.

THIS case appeared in the cause list as a special jury cause; but when the special jury causes before it were disposed of, it was not called on, because no special jury had been summoned in it.

*Gazelee* applied to his Lordship to take this case before all the special jury causes were disposed of, as several of the witnesses came from the country. The special jury had been applied for by the defendant, and he had not caused the special jurors to be summoned; therefore he first delayed the plaintiff by getting it made a

special jury cause, and then delayed him again by omitting to cause the special jury to be summoned.

1824  
ARCHER  
v.  
AMFORD.

ABBOTT, C.J.—The proper way is, when in any case the special jury has not been summoned, for the case to be taken after the other special jury causes fixed for that day are disposed of, but not to make the cause wait till all the special jury causes in the whole list are tried. The reason of taking such a case at the end of the day is, not to keep the special jurors summoned in other causes in waiting longer than is necessary. This has been the practice ever since I have known Guildhall. I shall take this case at the end of the day.

The case was tried at the end of the day by a common jury.

*Gazelee and E. Lawes* for the plaintiff.

The *Attorney General*, *Gurney*, and *Chitty*, for the defendant.

[Attornies—*Croft* and *Platt*.]

### BOLDRON v. WIDDOWS.

Jan 14th.

**THIS** was an action for defamation. The declaration stated that the plaintiff kept a school, and had divers scholars, and that the defendant spoke of him in his business of a schoolmaster certain words there set out. The words were variously laid in different counts; but they were in substance, that the scholars were ill fed, and badly lodged, had had the itch, and were full of vermin.

particular school; nor can he ask as to the manner of their education, because it is in question by the slander.

Evidence.—Slander of a school for filth and bad food; which was justified. To rebut the justifications, the plaintiff's counsel cannot ask how boys are treated at any other particular school; nor can he ask as to the manner of their education, because it was not called in question by the slander.

1824  
 BOLDRON  
 v.  
 WIDDOWS.

Some of the counts laid the loss of certain scholars, as special damage. Pleas—The general issue; and justifications, that the whole of the words were true.

For the plaintiff, several witnesses proved the speaking of the words, and that the boys were boarded, educated, and clothed, by the plaintiff, at £20 a-year each, near Richmond in Yorkshire: and the usher of the school was called to prove the boys well fed and well lodged, and had no itch. In his cross-examination it appeared that there were between eighty and ninety boys; that about seventy of them had had a cutaneous disease; and that they all slept in three rooms close to the roof, with no ceiling; and that there was a general combing of the heads of the whole school every morning over a pewter dish, and that the vermin combed out were thrown into the yard; no boy was free from them. A piece of bread of a perfectly black hue was shewn him: he did not think the bread in the school so black as that.

The witness having stated that he had himself been at the Appleby grammar-school, the plaintiff's counsel wished to ask him what was the quality of the provisions used by the plaintiff's school, compared with those consumed by the Appleby grammar-school.

The defendant's counsel objected to this.

ABBOTT, C. J.—That cannot be asked; what is done at any particular school is not evidence. You may show the general treatment of boys at schools, and show that the plaintiff treated the boys here as well as they could be treated for £20 a-year each, for board, education, and clothes.

One of the plaintiff's scholars was then called to prove the plaintiff's good treatment of them.

In cross-examination, the defendant's counsel wished to ask him, whether the plaintiff did not set the boys to plant potatoes in school hours?

ABBOTT, C. J.—I do not think you can ask this; the issue here being whether the plaintiff's scholars were ill fed, badly lodged, had the itch, and had vermin: nothing has been said as to their being badly educated. Their education is not in question here.

1824  
BOLDRON  
v.  
WIDDOWS.

Gurney, for the defendant, addressed the jury, and called witnesses to prove the truth of the words.

Verdict for the plaintiff, damages £120.

Scarlett and E. Lawes, for the plaintiff.

Gurney and Pollock, for the defendant.

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BEFORE MR. JUSTICE BEST.

(Who sat for the Lord Chief Justice.)

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REX v. WHITEHEAD.

Jan. 16th.

THIS was an indictment against the defendant, and a clergyman named Brown, (who had gone to America), charging them with conspiring to defraud Sir Alexander Campbell, by falsely representing the values of certain livings, tithes, and estates, the property of Brown, and falsely alleging him to be the owner of other estates, to which he had no claim; and by this representation inducing Sir A. Campbell to lend a large sum of money secured on these estates. This was the substance of the charge contained in a very long indictment, consisting of a great number of counts. Plea—Not Guilty.

Evidence.—  
On indictment for a conspiracy, the letters of one of the defendants to the other are under certain circumstances admissible in evidence in his favor, to show that he was the dupe of the other, and not himself a participator in any fraud.

This case had been formerly tried before ABBOTT, C. J. when this defendant was found guilty; but the Court above granted a new trial on affidavits.

1824!  
REX  
v  
WHITEHEAD.

The solicitor of Sir A. Campbell proved that the defendant had represented to him the value of the property, and that it belonged to Brown.

The *Attorney General*, in cross-examination, wished to ask him, if he had not given a guarantee to Sir Alexander Campbell?

*Scarlett* objected, that, as this was not on *voir dire*, the defendant's counsel had no right to ask this without producing the written guarantee.

The learned judge over-ruled the question.

The partner of the last witness was then called; and the defendant's counsel wished to show that he and his partner had given a guarantee to Sir A. Campbell.

BEST, J.—Even if it were so, they would still be competent witnesses on this prosecution.

This witness then proved the representations, and the falsity of them.

A number of papers, purporting to be copies and abstracts of documents relative to the title of the property, were put in. These were proved to be almost all fictitious; but, though produced by the defendant to Sir A. Campbell's solicitor, they were proved to be nearly all in the hand-writing of Brown.

Witnesses were then called to prove the falsehood of the representations.

The evidence of a witness, examined for the prosecution on the former trial, but who had since died, was read from the Lord Chief Justice's notes, by order of the Court above.

The defence was, that this defendant, instead of being a participator in the guilt of Brown, was really acting *bona fide*, and was himself deceived.

To substantiate this, witnesses were called, who proved

that Brown was a clergyman, and was most respectably connected, and that he made to the defendant similar representations of his property to those that the defendant made to Sir A. Campbell's solicitor.

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}  
REX  
v.  
WHITEHEAD.

The *Attorney General* then offered to put in the whole of the correspondence between Brown and the defendant, at and about the time of the negotiation.

*Scarlett* objected, that though the letters being between two persons jointly indicted for a conspiracy might be evidence against them, still they could not be evidence for them.

The *Attorney General*. The question is, whether the defendant's acts and representations were done and made *bona fide*, by him, or with a fraudulent intent. It is also material for him to show by these letters, that Brown made representations to the defendant, similar to those the defendant made to the agents of Sir A. Campbell.

BEST, J.—I think them admissible; for what the parties say at the time, is evidence to show how they acted.

The letters were then read.

BEST, J.—Left it to the jury to say on this evidence, whether they believed that the defendant joined with Brown to defraud Sir A. Campbell, or whether the defendant was innocent of the fraud, and himself deceived by the representations of Brown.

The Jury acquitted the defendant.

*Scarlett*, the *Common Serjeant*, and *Curwood*, for the plaintiff.

The *Attorney General* and *Gurney*, for the defendant.

[Attornies—*M'Dougall* and *Saggers*.]

1894

IN this vacation, Lord Chief Justice DALLAS having resigned, Sir ROBERT GIFFORD, Knight, his Majesty's Attorney General, was appointed Lord Chief Justice of the Court of Common Pleas. Sir JOHN SINGLETON COPLEY, Knight, was appointed Attorney General, vice Sir ROBERT GIFFORD; and CHARLES WETHERELL, Esq., one of his Majesty's counsel, was appointed Solicitor General, vice Sir JOHN SINGLETON COPLEY. Lord Chief Baron RICHARDS having died, WILLIAM ALEXANDER, Esq. one of the Masters of the Court of Chancery, was appointed Lord Chief Baron of the Court of Exchequer.

## COURT OF KING'S BENCH.

*Sittings in Hilary Term, at Westminster.*

BEFORE LORD CHIEF JUSTICE ABBOTT.

Jan. 28th.

MALTON v. NESBIT and Another.

In action for negligently steering a ship, whereby she was wrecked, & plaintiff lost his passage in her, no evidence can be given of a specific act of negligence, which is not the

foundation of the action. You may give evidence, that the captain had often expressed his conviction, that the officer to whom he gave charge of the ship was incompetent for that situation. You may call experienced nautical men, and ask them, whether, in their judgment, particular facts, which have been proved, amount to gross negligence.

**THIS** was an action on the case. The first count of the declaration stated, that the defendants were the owners of the ship Apollo, and that the plaintiff took his passage in that ship from Madras to London, and paid the defendants for it £175; and that it became the defendant's duty to carry him safely, (the acts of God, and the king's enemies, and perils of the seas excepted), yet that, by reason

of the negligence of the defendants and their servants, the ship was wrecked in Table Bay; and that the plaintiff was injured by having to pay for a passage in another ship and to stay for some time at the Cape of Good Hope. This was varied in three other special counts, and there was also a count in trover. Plea—Not guilty.

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v.  
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& Another.

To show that the defendants were the owners of the ship, a clerk from the Custom-house produced an affidavit made by them under the register acts.

An officer of the navy, who was a passenger in the *Apollo*, was called to prove the negligence of the captain and crew. He was proceeding to state their negligent conduct at an earlier part of the day, on which the accident happened, but—

ABBOTT, C. J. held, no evidence could be given of a specific negligence, which was not the ground of the present action.

This witness was then asked who had the charge of the watch at the time the ship was wrecked. He stated that it was the second mate; and that he had both before and after the wreck heard the captain say, that the second mate was wholly incompetent to have the charge of the watch.

*Scarlett* objected to these statements of the captain being received in evidence.

ABBOTT, C. J.—I must receive this evidence. The captain leaves the ship in the charge of a person he himself considers incompetent: this is certainly evidence of negligence on his part.

Evidence was given, that, for some hours before the wreck, the ship was in Table Bay, and no soundings were made, nor look-out kept. This was confirmed by many witnesses. Evidence was also given of the expense and



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NESBIT,  
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loss incurred by the plaintiff in consequence of the wreck of the ship.

A witness was then called, who stated that he had been a master in the navy for seventeen years.

The plaintiff's counsel wished to ask him, as a man of experience in nautical matters, whether, supposing the facts as proved to have occurred, they shewed negligence in the captain.

*Scarlett* objected; but—

ABBOTT, C. J.—Held, that the plaintiff's counsel might state to the witness what had been done, and might ask him if an officer of competent skill would have done so.

The defence was, that there was no negligence; and to prove this, the captain, chief-mate, and some of the crew (having been released) were called.

ABBOTT, C. J.—Left the case to the jury, on the question of negligence, or no negligence.

Verdict for the plaintiff; damages, £120.

The *Attorney General*, *Gurney*, and *Jardine*, for the plaintiff.

*Scarlett*, *Adam*, and *Parke*, for the defendant.

[Attornies—*Martinez* and *Dinnet*.]

1824.

## COURT OF COMMON PLEAS.

*Sittings in Hilary Term, in London.*

BEFORE LORD CHIEF JUSTICE GIFFORD.

SEWELL & BRET, Assignees of Sarah and James Wright, Jan. 25th.  
 v. STUBBS and HANCOCK.

**THE** plaintiffs were assignees of the bankrupts, who had been hatters, and brought the present action to recover £123, as money had and received, to the use of the bankrupt's estate. There were the common money counts. Plea—General issue.

If in conversation the opposite party states the contents of a written paper, you may give such his declaration in evidence, without producing the paper.

The case opened was, that, before the bankruptcy, Messrs. Philips and Dean had bought a quantity of hats of the bankrupts, to take to South America; and, after the bankruptcy, had remitted £123 to the defendants for them to pay to the estate. The commission was put in, and the petitioning creditor's debt. The trading and act of bankruptcy were proved by the proceedings under the commission, no notice to dispute them having been given under the statute of 49 Geo. 3, c. 121.

If a witness has given a note jointly with others for a sum of money to indemnify the defendant in the action, and his name has been erased from the note by consent of all parties to it, his competency is restored, and he may be examined for the defendant.

*Pell*, Serjt. asked the solicitor, who produced the proceedings, whether one of the plaintiffs had not told him, that he held a note of Messrs. Philips and Dean for £100, part of this £123?

*Vaughan*, Serjt. objected, that the witness could not be asked the contents of the note.

GIFFORD, C. J.—They may certainly ask any thing that either of the plaintiffs said.

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BRETT, Assign-  
ees of Sarah  
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The witness stated that one of the plaintiffs had so told him. Mr. Dean was then called: he was asked on *voir dire*, by Mr. Serjt. *Pell*, whether he had not given a note for £100, part of this sum, as a collateral security, in case the plaintiffs failed in this action. The witness stated that he had given such a note, but that his name had been erased from the note by consent of all the parties, but that he had had no release (a).

GIFFORD, C. J.—If his name has been erased from the note by consent of all parties, he is a competent witness.

The witness proved the payment of the money to the defendants, for the plaintiffs.

The defence was, that the defendants had paid the money over to the bankrupts, and that the assignees afterwards consented to discharge the defendants from their liability, and receive the money from the bankrupts. It was admitted, however, that he had never paid it over. This defence failing in proof, there was a

Verdict for the plaintiff, for £123.

*Vaughan*, Serjt. and *Stephen*, for the plaintiff.

*Pell*, Serjt. for the defendant.

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THE Right Honorable Sir ROBERT GIFFORD, Knight, Lord Chief Justice of the Court of Common Pleas, was created a peer by the style and title of Baron GIFFORD of St. Leonard's, in the county of Devon.

(a) On *voir dire*, counsel are allowed to ask a witness as to the contents of written papers, to show him incompetent.

*Sittings at Westminster.*

BEFORE LORD CHIEF JUSTICE GIFFORD.

EVEREST *v.* WOOD.

Jan. 31st.

**TROVER** for bricks. Plea—General issue. The plaintiff in this case proved his property in the bricks, having taken an assignment of them from a former owner of them, and also the value of them.

Trover for bricks. Evidence that men fetched them away, saying they were ordered by the defendant; and evidence that the cart they took them in had on it the same name as the defendant's, is not evidence to go to the jury, that the defendant took them away.

To prove conversion, a witness stated that some men fetched away the bricks in a cart; and on his asking them why they did so, they said they were ordered by their master, Mr. Wood. The witness also stated that the name "James Wood" was painted on the cart. Another witness proved that he served a demand of the bricks on the defendant.

LORD GIFFORD, C. J.—What the men said is no evidence against the defendant; and the name "James Wood" on the cart might be the name of any other "James Wood." There is no evidence to connect the defendant with the transaction: I must nonsuit the plaintiff.

Plaintiff nonsuited.

*Vaughan*, Serjt. and *Platt*, for the plaintiff.*Taddy*, Serjt. and *Comyn*, for the defendant.[Attornies—*Carpenter* and *Sheppard*.]

1824

Jan. 31.

GOODMAN v. LOVE.

The defendant having contracted to rebuild a house, employed the plaintiff to do the bricklayer's work. The owner of the house, who had paid neither of them, is a competent witness to prove that the plaintiff did the work.

**ASSUMPSIT** for work and labour, with the common money counts. Plea—General issue.

The case opened for the plaintiff was, that the defendant, having contracted to rebuild a public house called the Blue Posts, employed the plaintiff to do the bricklayer's work.

To prove that the plaintiff had done the work, his counsel called the owner of the Blue Posts, who had not paid any one for the work.

*Vaughan*, Serjt. objected that this witness was incompetent, because he was to prove that work had been done at his house, and that some one else (the defendant) was liable to pay for it.

**LORD GIFFORD, C. J.**—The witness's interest is equal, for the witness is liable to pay some one, and he is indifferent, whether he pays the plaintiff or the defendant.

Verdict for the plaintiff, for £170.

*Pell*, Serjt. and *Storks*, for the plaintiff.

*Vaughan*, Serjt. for the defendant.

[Attornies—*Carlos* and *Jones*.]

*Sittings in London.*

BEFORE LORD CHIEF JUSTICE GIFFORD.

RAWSON and Ors. Assignees of WILKINSON, v. HAIGH,  
Executor of HAIGH.

Feb. 2nd.

**ASSUMPSIT** for goods sold by the bankrupt to the defendant's testator.

No notice had been given of the defendant's intention of disputing either the trading, petitioning creditor's debt, or act of bankruptcy.

The solicitor to the commission put in the commission and proceedings under it. The commission was dated 6th Sept. 1822. The petitioning creditor's debt was clearly proved by his deposition under the commission. The proof of the act of bankruptcy was also from the depositions under the commission. A witness, named Llewellyn deposed, that the bankrupt made an appointment to meet the witness on the 3rd. of July, 1822, to settle an account in which the bankrupt was interested, but on which the bankrupt owed nothing, and that a letter (annexed to the deposition) was received from the bankrupt, stating that urgent business obliged him to go to France. This letter had an inland post mark, but no foreign one; the postage charged on it was one shilling.

*Semble*, that a letter written by a bankrupt shortly after absentsing himself from home, is evidence to show his motive in going, but not to prove the fact of his absence.

Another letter from the bankrupt was read, it was dated August, 1822, it stated that for fear of being arrested, he should be obliged to remain in Paris.

*Vaughan*, Serjt. objected that this letter was not evidence; and if it was, the whole amounted to nothing; for though the motive of a bankrupt's absence might be proved by his letters, the fact of his absence could not be so

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 Haigh.

proved; but here almost every thing is to be proved by the bankrupt's letters, though not a word of it could be proved by his evidence.

*Pell*, Serjt. *contra*, the objection is, that the bankrupt cannot be permitted to say, "I was absent at such a particular time," though he might declare his motive for his absence; but here Llewellyn proves his absence in July, and his letter in August shows that he was absent to avoid his creditors; and cited *Maylin v. Eyloe*, 2 Str. 809, and *Bateman v. Baylis*, 5 T. R. 512.

LORD GIFFORD.—Supposing that, instead of the deposition, a witness had proved that the bankrupt had said that he was absent at Paris to avoid his creditors, would that be sufficient?

*Pell*, Serjt. answered in the negative.

LORD GIFFORD.—The allowing the letter as proof, would at once let in the bankrupt to prove his own act of bankruptcy.

*F. Pollock* contended, that there was at least evidence to go to the jury of an act of bankruptcy, for they had evidence that the bankrupt did not keep his appointment, and a letter in excuse sent from a distant place, as appears by the charge of a shilling for postage. In order to prove a man out of London, it is not necessary to call a person who saw him in some other place: if a letter in the handwriting of the person is received, bearing the post mark of any other place, a jury may fairly presume that the writer is at that place.

*Vaughan*, Serjt. contended, that there was not a scintilla of evidence of the act of bankruptcy, except the letters. If the plaintiffs fix the date of the act of bankruptcy at the time of the breach of appointment, in July,

then that absence is explained by the first letter, which states that the reason of it was urgent business; if they fix the date of it in August, then there is only the last letter to prove both the fact of absence, and the motive for it.

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**Lord GIFFORD.**—The letter in August is too distant from the breach of appointment in July to be considered as explaining the motive of that absence. There was a case at Exeter, in which a bankrupt's declaration, made a day or two after his absenting himself from home, was admitted as evidence of the motive of the absence; but there was considerable difficulty in getting the declaration admitted in evidence, though so very near in point of time.

The plaintiff's counsel, to carry the case further, called a witness, who stated, that in July, 1822, he called three times at the bankrupt's counting house; he could never see him, but always saw the bankrupt's brother.

*Vaughan*, Serjt. objected, that there was no proof that his brother was his agent.

*Pell*, Serjt. the witness goes three times to make inquiries at the place where the business was carried on. The answer of the person at the place is evidence as to whether the person inquired for, is at home or not; *valeat quantum*.

**Lord GIFFORD.**—Thought it admissible, and gave *Vaughan*, Serjt. leave to move to enter a nonsuit, if the Court should think the proof of the act of bankruptcy insufficient.

The plaintiff's counsel saying that their attention had never been called to the proof of the act of bankruptcy, on the proceedings under the commission—

**Lord GIFFORD.**—Observed, that it was often supposed



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that when no notice was given of disputing the act of bankruptcy, it was intended to be admitted; but the truth was, that the only difference made by the act, was, that the depositions were made evidence, where there was no notice to dispute; but upon the depositions, as good an act of bankruptcy must be shown as if there was notice, and witnesses called to prove the act of bankruptcy.

To prove the debt for which the action was brought, a witness proved that the defendant admitted it.

The defence was, that the supposed admission was made, while a negotiation for a compromise was pending; but this was not made out in proof.

Verdict for the plaintiffs.

*Pell*, Serjt. and *F. Pollock*, for the plaintiff.

*Vaughan*, Serjt. and *Evans*, for the defendant.

[Attornies—*James* and *Clark*.]

Feb. 2nd.

### HILL v. SANDERS.

In action of covenant, in setting out the deed, if the word "an," is written instead of "one;" and the name "Burl" written instead of "Burt;" these are not fatal variances. Nor is the stating a lease to be for 21 years, & proving it to be 21 years determinable at the

**THIS** was an action of covenant for rent. Pleas—After oyer of the deed; 1st, *Non est factum*; 2nd, A plea, which had been demurred to; 3rd, That the plaintiff was entitled only in right of his wife, who had died without issue, whereby John Acton, her heir at law, had become seized; 4th, That no rent was due to the plaintiff.

The execution of the deed having been proved, it was read; it was a lease for 21 years, of lands at Henbury, from the plaintiff and his wife to the defendant.

The defendant's counsel checked it with the record, where it was set out as the oyer; and—

option of either party at the end of 7 or 14 years. If the defendant alleges a seisin in fee by it, and the plaintiff in the replication traverse that plea, he is at liberty to shew that A. had only an estate for life, and need not reply that specially.

*E. Lawes*, objected, that "an" was written for "one;" and the name "Burl" was written for "Burt," the *t* not being crossed, which he contended were fatal variances.

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These objections were overruled by the Lord Chief Justice.

*Lawes*, Serjt. then submitted, that the plaintiff must be nonsuited on the ground of variance, because the demising parties were stated on the record to be the plaintiff and his wife: now this was not supported, because a feme-covert cannot be a demising party; therefore, in construction of law, this is only the demise of the husband alone, and cited the case of *Arnold v. Revolt*, (1 Brod. & B. 443). In that case a nonsuit had been directed, because the lease was from the husband and wife, and was stated on the record to be the lease of the husband only. But the court set aside the nonsuit on the ground, that in law it was the lease of the husband only, and therefore the legal effect had been properly stated.

The learned Serjeant's next objection was, that the deed in evidence was a lease for 21 years, determinable at the end of 7 or 14 years, at the option of either party. The lease declared on was only stated to be a lease for 21 years.

LORD GIFFORD, C.J.—I think that will do; and if there be any thing in the other objection, it is on the record, and you may move in arrest of judgment.

*Lawes*, Serjt. addressed the jury for the defendant, and stated, that the plaintiff's wife took under the will of Mrs. Brook; and that the property descended to Mrs. Hill's heir at law, on her death.

A witness produced the original will of Mrs. Brook, from the registry of the diocese of Worcester; it was dat-

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ed Nov. 7, 1785: the property was devised by it to Mrs. Hill, by the name of Nancy Acton.

A witness produced examined copies of the parish registers of Tiverton, to prove the burials, of Mrs. Brook in 1787, and of Mrs. Hill, in 1817.

In reply, the plaintiff's counsel called a witness, who proved and put in a deed, dated 24th June, 1794.

This was the marriage settlement of Mr. and Mrs. Hill; in this an estate for life in the premises in question was limited to the plaintiff, after the death of his wife.

*Lawes*, Serjt. objected, that after they had proved a seizin in fee by descent, the plaintiff's counsel could not produce evidence of a particular interest, without replying it on the record.

LORD GIFFORD, C. J.—They may show that Mrs. Hill was not seized in fee, for they traverse your plea. In my opinion the plaintiff has made out his case.

Verdict for the plaintiff.

*Vaughan*, Serjt. and *Russel*, for the plaintiff.

*Lawes*, Serjt. and *E. Lawes*, for the defendant.

[Attornies—*Hill* and *Bousfield*.]

# OXFORD SUMMER CIRCUIT.

1823.

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BEFORE MR. JUSTICE PARK, & MR. BARON HULLOCK.

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## ABINGDON ASSIZES.

BEFORE MR. BARON HULLOCK.

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REX v. BENJAMIN MILLINGTON.

1823.

July 7th.

**THIS** prisoner was convicted of stealing a horse. *Rigby*, in applying for the expenses, asked to be allowed for witnesses going from Compton, in Somersetshire, to Easthampstead, in Berkshire, to identify the horse, soon after the prisoner was apprehended, in addition to the usual charges.

Expenses of witness going to identify stolen property disallowed.

**HULLOCK, B.**—I have no power to allow those charges. I can only allow the expenses of the prosecution (a).

(a) The statute of 58 Geo. 3, c. 70, empowers, in prosecutions for felony, the Court to allow, at the request of the prosecutor, or of any person subpoenaed or bound over to give evidence, or of any person who has been instrumental in the

apprehension of the prisoner, “the costs of preferring the indictment or indictments, and a reasonable sum, or sums, to reimburse the prosecutor, and witnesses or persons concerned in apprehending, for their expenses

1823.

July 7th.

REX v. THOMAS SIMMONDS.

Tho' the counsel for the prosecution is not bound to call every witness whose name is on the back of the indictment, the judge will sometimes call those omitted to be called by the prosecution.

**THIS** prisoner was indicted for stealing a mare. When the counsel for the prosecution had closed his case —

**HULLOCK, B.**—Observed, that there was the name of another witness, (who had not been called), on the back of the indictment.

The counsel for the prosecution declined calling him.

**HULLOCK, B.**—Though the counsel for the prosecution is not *bound* to call every witness, whose name is on the back of the indictment, it is *usual* for him to do so: and if he does not, I, as the judge, will call the witness, that the prisoner's counsel may have an opportunity of cross-examining him (*a*).

“ in preferring the indictment,  
 “ and otherwise carrying on the  
 “ prosecution; and also to com-  
 “ pensate the prosecutor, witness-  
 “ es, and persons concerned in the  
 “ apprehending, for their trouble  
 “ and loss of time in such appre-  
 “ hension and prosecution as afore-  
 “ said.” By § 5, the expenses to  
 persons apprehending are to be  
 paid by the sheriff. And by § 6,  
 expenses to prosecutors and wit-  
 nesses are to be paid by the trea-  
 surer of the county.

(*a*) In the case of *Rex v. Robert Whitbread*, C. B., June, 1823, for larceny, (M S.), *Alley*, for the prosecution, omitted to call an apprentice of the prosecutor, who had been implicated in

the theft, and was examined at the police office, and before the grand jury, and whose name was on the back of the indictment. *Andrews*, for the prisoner, contended, that the witness ought to be called, as he was on the back of the indictment. *Alley* refused to call him, saying, that the prisoner's counsel might himself call him if he chose. *HOLROYD, J.* and *BURROUGH, J.* held, that the prosecutor's counsel are not *bound* to call all the witnesses, whose names are on the back of the indictment, merely to let the other side cross-examine them. The witness was not called at all. However, at the Worcester Sum. Ass. 1823, *PARK, J.*, in the case of *Rex v. John Tay-*

The witness was then called by the counsel for the prosecution.

Verdict—Guilty.

1823.  
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 Rex
 v.
 SIMMONDS.

Shepherd, for the prosecution.

Carrington, for the prisoner.

[Attornies — and *Frankum*.]

REX v. SARAH PITCHER.

July 8th.

THIS prisoner was indicted for stealing the prosecutor's watch from his person.

The prosecutor stated, that the prisoner stole his watch from him, at a house near Ascot Heath race-course.

In the cross-examination of the prosecutor, he admitted that he walked with the prisoner on Ascot Heath race-course, and that he had never seen her before; that they went together to a house, not a public-house, into which he had never been before, and of which he knew not the occupier. At this house he asserted that he lost his watch.

On indictment of a female prisoner for stealing from the person, in a house, you cannot ask the prosecutor, in cross examination,—
 “Whether at that house any thing improper passed between him and the prisoner?”

The prisoner's counsel wished to ask him, if “at that

her, for larceny, called all the witnesses on the back of the indictment, whom the prosecutor had not called, merely to allow the prisoner's counsel to cross-examine them. It seems more conducive to the discovery of truth, to call every one who has ever been a witness in the case, than to allow the prosecutor to select

his witnesses, and keep back any one whom he considers unfavorable to his prosecution. As to the prisoner's counsel calling them, in general he would be very unwise to risk, as *his* witness, any man who has ever been thought of as a witness in support of the prosecution.

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REX

v.

FITCHER.

house any thing improper passed between him and the prisoner?"

HULLOCK, B., held, that the question ought not to be put (a).

Verdict—Not Guilty.

Rigby, for the prosecution.

Carrington, for the prisoner.

[Attornies — and *Frankum*.]

(a) The law as to what questions may be asked in cross-examination, the answers to which have a direct tendency to degrade the witness, is very obscurely laid down in the books: and if they are permitted to be asked, there is equal obscurity, whether the witness shall be excused from answering. As to *whether a witness is compellable to answer* degrading questions, in the case of *Cooke*, and the case of *Sir John Freind*, for high treason, TAYLOR, C.J. laid down, that a witness is not bound to answer questions "that will subject him to penalties or infamy." In *Laver's* case the Judges appear to be of the same opinion. All these cases are reported at large in the state trials. As to *what questions will be allowed to be put*: In the case of *Macbride v. Macbride*, 4 Esp. Rep., which was an action of assumpsit, a female, who had proved the plaintiff's demand, was cross-examined as to whether she was not in keeping of the plaintiff; and Lord ALVANLEY over-

ruled the question, on the ground that a witness cannot be asked questions to degrade his character: and in *Rex v. Lewis*, 4 Esp. Rep. which was an indictment for an assault, Lord ELLENBOROUGH would not permit the prosecutor to be asked whether he had been in the house of correction. However, on the other hand, there are the cases of the *King v. E. Edwards*, 4 Ter. Rep. 440, and that of *Dr. Watson*, tried at bar for high treason. The first was an examination of persons who were tendered as bail for the prisoner, who was charged with a larceny. The Court allowed one of them to be asked, if he had ever stood in the pillory for perjury; and in the latter case Mr. *Wetherell*, for the prisoner, asked a witness, named Castles, all sorts of degrading questions. In practice, the asking of questions to degrade the witness is regulated by the discretion of the learned judge, in each particular case: for in the case of *Rex v. John Barnard & al.* (*infra*),

1823.

REX v. JOHN BARNARD, JOHN FARMER, and JOHN BED-
FORD.—For a Burglary.

July 8th.

IN this case, before the bill was presented to the Grand Jury, *Shepherd* stated to the Court, that he had read over the depositions taken before the Magistrate, and that in his opinion there was not sufficient evidence against the prisoners, without admitting an accomplice named Herbert, as king's evidence.

Moving to admit king's evidence.

HULLOCK, B.—Let it be so (a).

an accomplice was asked, (unchecked by the learned Baron), whether he had ever been charged with felony? how many times? whether he had been charged with uttering counterfeit coin? with stealing clothes? with stealing fowls? and whether he had not been in gaol at Gloucester? and flogged at Wantage? to each of which questions the witness very reluctantly gave a distinct answer, admitting nearly the whole of them. This man, it may be said, was an accomplice, and therefore more open to attack. But in *Rex v. James, Gilroy and Dennis English*, Stafford Lent Ass. 1823, before *Bosanquet*, Serj. the counsel for the prisoners, who were indicted for highway robbery, was allowed to ask a witness, who stated that he had been a constable, whether he had not been turned out of office for misconduct towards a prisoner? which he, very much against his inclination, admitted. A question which, if

answered *either* way, will benefit your client, is always a question worth putting. The question in the principal case appears to be of this kind. It was, "whether at the house any thing improper passed between him and the prisoner?" If he said "yes," it degraded him with the jury: if he said "no," nobody who heard the case would believe it; and it would shake his general credibility. If over-ruled, it induced the jury to believe that such was the fact, and that the prosecutor, if allowed, would have admitted it.

(a) The way to get an accomplice admitted king's evidence, is, before you present your bill to the Grand Jury, to get your counsel to read over the depositions; he then in court states to the Judge that, having read them over, he conceives he cannot safely go on, unless A. B., one of the prisoners, is admitted king's evidence. If this is granted, which is almost a matter of course, the attorney gets

1823.

REX

v.

BARNARD
& ORS.

The bill having been found, the accomplice was called for the prosecution, and a good deal shaken in his cross-examination; but was confirmed on several material points, by other witnesses.

Corroboration
of accomplice's
evidence need
not be on *every*
material point.


HULLOCK, B. in summing up, said, that he would never advise a jury to find prisoners guilty, on the evidence of an accomplice without corroboration; but it was not necessary that he should be corroborated on *every* material point, as, then, his evidence would be superfluous; but he must be confirmed in such, and so many material points, as to convince the jury that his statement was the truth (b).

an order from the clerk of assize, directing the gaoler to take the king's evidence before the Grand Jury: you then present your bill to the Grand Jury in the usual manner.

(b) I apprehend that a king's evidence, being a *competent* witness, a jury, if they believe him, may *legally* convict on his evidence unconfirmed; though the Judge always advises them, under such circumstances, to acquit. In modern practice no conviction takes place, without some confirmation of the king's evidence. In *Rex v. Rudd*, Cowp. Rep. 336, Lord MANSFIELD says, that "though these witnesses are clearly competent, their single testimony is *seldom alone sufficient* for a jury to convict upon." In *Jordayn v. Lashbrook*, 7 Ter. Rep. 609, GROSE, J. cites the case of *Rex v. Atwood* and al. before BULLER, J., Somerset Sum. Ass. 1787; where the prisoners were convicted of a robbery, on the evidence *only* of an accomplice unconfi-

firmed by any other witness, as to their identity. In 1 Hale, P. C. 303, in the case of *Rex v. Tonge*, for high-treason, the Judges held that an accomplice was a competent witness to be one of the two witnesses to prove high-treason, and that the jury may, as in other cases, consider of the credit of witnesses. By 1 Hale, P. C. 304 and 305, it appears that Mary Price was convicted of clipping the coin, on the evidence of accomplices only; as was shortly afterwards a person named Hyde, for a highway robbery. A leading modern case on this subject is *Rex v. Swallow* and others, before a special commission at York, in 1813; there THOMSON, B. laid down, that if an accomplice giving evidence against several prisoners, is confirmed as to some of the prisoners, the jury, if they believe he speaks the truth, may convict those against whom his evidence stands unconfirmed, as well as the others.

Verdict—Guilty; against Barnard and Farmer. Bedford not Guilty.

.1823.

 REX
 v.
 BARNARD
 & ORS.

Shepherd, for the prosecution.

Bicheno, for the prisoner Barnard.

Carrington, for the prisoner Farmer.

Rigby, for the prisoner Bedford.

[Attorney for prisoner Barnard, *Lloyd*; for the other two *Frankum*.]

OXFORD ASSIZES.

BEFORE MR. BARON HULLOCK.

DAVENPORT v. RACKSTROW, Gent., one &c.

July 10th.

THIS was assumpsit for a tailor's bill; and the defendant had pleaded the general issue, and given notice of set off.

The plaintiff's son, who was called for the plaintiff, was examined on *voir dire*, he stated that he was not a partner with his father, though his name was used as such; his name was put to the bills, and the books were kept in the names of "Davenport and Son;" but he had no share whatever of the profits.

An ostensible partner proved not to be *really* a partner, need not join in actions on contracts with the supposed firm.

HULLOCK, B.—If he is not a partner, he is a competent witness; his father merely calling him his partner, will not affect his competency (a).

(a) The view of Mr. Cross in asking those questions on *voir dire*, was to show the witness incompetent, and to nonsuit the plaintiff;

1823.
 DAVENPORT
 v.
 RACKSTROW.

He was then examined in chief, and produced a copy of the bill delivered to the defendant, notice having been given to the defendant to produce the original: he stated that the defendant had acknowledged the delivery, and the prices were proved to be reasonable and fair.

The defendant's set off was an attorney's bill, due from the plaintiff to the defendant, which had been taxed by the Prothonotary. A witness proved, that a paper he produced was a copy of the allocatur, the original of which was signed by the prothonotary, and had been given to the plaintiff, on whom it was admitted notice to produce it had been served.

Verdict for the plaintiff, for the balance.

Curwood and Carrington, for the plaintiff.

Cross, for the defendant.

[Attornies—*Fairthorn & Lofty*, and *Rackstrow*.]

the action being brought by the father alone, and not by both jointly. If it had appeared, that the father and son were *ostensibly* partners, it would have been incumbent on the plaintiff's counsel, to have shown distinctly that the son had no share in the profits of the trade; for in the case of *Teed v. Elworthy*, 14 Ea. Rep. 210, the plaintiff, a banker at Plymouth, sued the defendant for a balance of his banking account, he having overdrawn it. It appeared in evidence, that the bank traded as "John Teed, *Thomas Teed*, and "Co." but the bank clerk stated, in the course of his evidence,

that Thomas Teed, the son of the plaintiff, was aged 16, and clerk to an attorney, and had *no concern in the bank*. The Court of King's Bench ruled, that the account being in the names of John Teed, Thomas Teed, and Co. to entitle this plaintiff (John Teed,) to recover, he must *distinctly prove* that *he alone* was proprietor of the funds of the bank. However, the cases of *Lloyd v. Archbole*, and *Mawman v. Gillet*, 2 Taunt. Rep. 324, decide that if a defendant *contract with one person alone*, and that person permits another to take the benefit of a share of his contract *unknown to*

1823.

Doe, on the demise of ANDERSON and Elizabeth his wife
v. TURNER.

July 11th.

IN this case the lessors of the plaintiff had proved their case, when—

A fine with proclamations by a disseisor bars ejectments, unless there has been an actual entry, to avoid its operation.

Taunton, for the defence, put in an examined copy of a fine, with proclamations, of the premises in question, levied within five years past.

HULLOCK, B., said, that unless the lessors of the plaintiff could prove an actual entry on the premises, to avoid the effect of this fine, it put an end to the present ejectment. His Lordship lamented that parties should be put to unnecessary expense, but the only thing for the lessors of the plaintiff to do, was to make an actual entry before five years from the levying the fine had expired, and then to bring a fresh ejectment (a).

Peake, Serjt. for the plaintiff.

Taunton, for the defendant.

the defendant, such secret partner need not join in the action. But you may compel a dormant partner as a defendant to pay you, if you can find him out, because he has had the benefit of your work.

(a) The trick of a party who has gained a tortious possession, levying a fine to turn round the lessor of the plaintiff, who, not suspecting a fine, has brought his ejectment without a previous actual entry for the purpose of avoiding such fines as the present, is in prac-

tice very often resorted to. The useless expense in costs to the plaintiff is considerable, when he is so turned round: it therefore seems to be but prudent in all such cases to make an actual entry, before bringing an ejectment, to prevent the success of the trick. The way to prove a fine, is to produce the foot of the fine, if you have it, which is evidence; though in all cases where the proclamations must be proved, they can only be so by an examined copy of the

1823.

July 11th.

QUARTERMAN and al. v. GREEN and al.

What notes are
negotiable or
transferable
within the stat.
of 17 Geo. 3,
c. 30. Quare.

THIS was an action on a promissory note, in the following terms.

“ August 6th, 1822.

“ We jointly and severally promise to pay Messrs. Quar-
“ terman and Bowman, four pounds, sixteen shillings, six
“ months after date.

“ J. Green.

“ J. Green, jun.”

For the defendants it was objected that this note was void, not being attested by a subscribing witness, under the 17 Geo. 3, cap. 30 (a).

original roll. One who has not the foot of the fine, proves the fine by getting an office copy of it at the Chirographer's office, and examining it, as well as the proclamations, with the original. The cheapest way of getting a witness to prove, at the assizes, this or indeed any other examined copy of a record in London, is for the clerk of one of your counsel, to examine the copy with the original, and bring the copy down to the assizes.

(a) The act on which the objection was taken, 17 Geo. 3, c. 30, § 1, enacts that all notes, bills of exchange, draughts and undertakings in writing, “ being *negotiable or transferable*, for the payment of any sum between 20s. and £5, shall specify the names and places of abode of the persons, respectively, *to whom or to whose order* the same shall be made payable, and shall

bear date before, or at the time of drawing or issuing thereof; and shall be made payable within the space of 21 days next after the day of the date, and shall not be transferable or negotiable, after the time thereby limited for payment; and that every endorsement shall bear date, at or not before the time of making thereof, and shall specify the name, and abode of the persons, *to whom or to whose order* the money contained in every such note &c. is to be paid, and that the signing of every such note &c. and every endorsement, shall be attested by one subscribing witness at least.” That a note in the form of that in the principal case, (that is, without the words bearer or order) is a legal promissory note, is settled by the case of *Smith v. Kendal*, 6 T. R. 123; in which a number of other cases to the same effect

HULLOCK, B.—This is a point of great importance; the act only makes void bills and notes, which are negotiable or transferable under £5 value, if not attested &c. I shall not now decide whether this is or is not a note negotiable or transferable. I shall direct the jury to find for the plaintiff, giving the defendant's counsel liberty to move to enter a nonsuit, if the Court above are of opinion that this note is within the act.

1823.
QUARTER-
MAN & al.
v.
GREEN & al.

Verdict for the plaintiff.

Taunton and Manley, for the plaintiffs.

Peake, Serjt. and Carrington, for the defendants.

[Attornies—*D. Taunton and Eyre*.]

WORCESTER ASSIZES.

HULME, Clk. *v.* PARDOE, Widow.

July 11th.

THIS was an action of assumpsit, for tithe composition: to which the general issue was pleaded. It appeared in evidence that Mrs. Pardoe had agreed with the plaintiff

A tithe composition, being at one undivided sum from Michaelmas to Michaelmas, the

tenant going away at Lady-day, must pay up the composition to the ensuing Michaelmas.

are cited. And that for forging such a note a person may be punished, as for forging any other note, is settled by the case of *Rex v. Box*, 6 Taunt. 325; in which, however, the Judges say, that though it *may* not be a negotiable note, it is still an offence to forge it. The only case as to whether such notes are transferable or not, is *Hill v. Lewis*, Salk. 132, where an endorsee of a note in this form succeeded in

an action against the endorser. It was objected that such a note could not be endorsed, not being payable to order or bearer, but that objection was overruled, Lord Holt saying that on such notes the endorsee might sue the endorser, but not the drawer. I believe that in the principal case, no motion to enter a nonsuit was ever made.

1822.
 HULME
 v.
 PARDOE.

to pay a tithe composition of £25 a-year from *Michaelmas* to *Michaelmas*. At Lady-day, 1822, Mrs. Pardoe quitted the farm, having, however, after Lady-day, 1822, divers titheable articles on the farm, and, what is termed, the way going crop. For the defendant it was contended, that she ought to pay the half year's composition, to Lady-day, 1822, and the tithe in kind of the way going crop &c., and not the composition of the entire year, which would expire at *Michaelmas*, 1822.

HULLOCK, B., ruled, that as the composition was at one fixed sum, from *Michaelmas* to *Michaelmas*, and the tithe year was begun, and the defendant had titheable matters on this farm, after the Lady-day, when it was contended the composition expired by her going away; she was bound to pay the whole year's composition, up to *Michaelmas*, 1822. However, he gave the defendant leave to enter a nonsuit, if the Court above should be of a contrary opinion, as it would save the expense of another trial.

Verdict for the plaintiff.

July 15th.

TURBERVILLE v. WHITEHOUSE.

An infant is suable for so much of goods supplied to him to trade with, as were consumed as necessaries in his own family.

ASSUMPSIT for goods sold and delivered. Pleas—

The general issue and infancy: replication, necessaries.

The plaintiff was a wholesale grocer, at Worcester; and the defendant, a retail grocer.

The delivery of the goods, (groceries in considerable quantities, for the defendant's shop), was proved in the usual way. When—

HULLOCK, B., intimated, that if the defendant was really

an infant, this evidence would not support the action; as no action could be maintained for goods supplied to an infant, for him to trade with.

1833.
TURBERVILLE
v.
WHITEHOUSE.

Evidence was then given, to show that the tea, sugar, &c. used by the defendant, in his housekeeping, was a part of the goods supplied by the plaintiff (a).

HULLOCK, B., on this evidence, left it to the jury, to say, whether any, and what part of the goods, supplied by the plaintiff had been used by the defendant's family.

Verdict for the plaintiff, damages £10.

Russel and *Ryan*, for the plaintiff.

Campbell, for the defendant.

[Attornies—*Edmunds* and *France*.]

(a) It has long been settled, that infancy is a good bar to an action for goods sold to an infant, for him to trade with. A defendant may either plead infancy specially, or avail himself of his infancy, under the general issue. The advantage of pleading it specially is, that the plaintiff must reply—necessaries, a promise since majority, &c. which shows the defendant what ground the plaintiff means

to rely on, in answer to his plea of infancy: and also a plaintiff replying necessities, or any other single ground of reply, cannot go into other grounds, to avoid the plea of infancy. It is the understanding, at the offices, that the plea of infancy must be signed by Counsel: and in practice it is so. Though, in some (and perhaps all), the editions of Impey's Practice it is stated to require no such signature.

1823.

(Crown side.)

BEFORE MR. JUSTICE PARK.

July 15th.

REX v. JAMES POWELL.

In frivolous cases of felony, the judge will not allow the prosecutor's expenses, tho' he was bound over by a magistrate.

THIS prisoner was acquitted, on a charge of stealing two hen-eggs.

Male applied for the expenses of the prosecution.

PARK, J.—In such a case as this, I certainly shall not allow the expenses.

Male observed that the magistrate, (Rev. Lord Aston), had felt it his duty to bind over his client to prosecute.

PARK, J.—If the magistrate felt it his duty to bind you over to prosecute, I feel it mine, not to charge the county with the expenses of such a prosecution (a).

Expenses disallowed.

(a) An understanding having pretty generally prevailed, that in prosecutions, however frivolous, the judge would allow the expenses, if a magistrate had bound over the parties, I thought it right to take a note of this case. The act of 58 Geo. 3, c. 70, leaves it perfectly in the discretion of the judge.

1823.

REX v. ELIZABETH GIBBONS.

July 16th.

THIS prisoner was indicted for the murder of her bastard child.

Mr. Cozens, a surgeon, was called to prove certain confessions made by the prisoner to him. The witness objected to giving such evidence, on the ground, that, at the time of the statement, he was attending the prisoner in the capacity of a surgeon.

Medical persons are bound to reveal confidential communications, when called upon in courts of justice.

PARK, J.—That is no sufficient reason to prevent a disclosure for the purposes of justice (*a*).

The witness also stated, that he had held out no threat or promise to induce her to confess; but a woman who was present said, that she had told the prisoner she had better tell all; and then the prisoner made certain confessions to the witness.

The confession of a prisoner is evidence, tho' previous to it an inducement to confess had been held out by another person, if that person had no authority.

Campbell objected, that, as the confession was made after an inducement held out, it could not be received in evidence.

PARK, J., after consulting with **HULLOCK, B.**, laid down, that, as no inducement had been held out by Mr. Cozens, to whom the confession was made; and the only inducement had been held out (as was alleged) by a person having no sort of authority; it must be presumed that the confession to Mr. Cozens was a free and volunta-

(*a*) The only communications privileged, are those to counsel, attorneys, and solicitors, entrusted with the communications as such. A leading case on the subject is

Wilson v. Rastall, 4 Ter. Rep, 759. That a medical man is bound to disclose communications made to him professionally, was decided in the *Dutchess of Kingston's* case.

1823.

STAFFORD ASSIZES.

(Civil Side.)

BEFORE MR. JUSTICE PARK.

July 18th.

BATE, Widow, v. HILL.

Witnesses cannot be cross-examined to facts not in issue, if such facts are injurious to the characters of persons not connected with the cause.

In seduction cases the plaintiff's counsel may call witnesses to the general good character of the party seduced, if her character has been attacked in cross-examination.

THIS was an action for seducing the plaintiff's daughter. In cross-examination, the daughter admitted, that she was on intimate terms with a Miss Atkinson. The defendant's counsel wished to ask whether Miss Atkinson had not had a child. This question was held improper by PARK, J., who said, that Miss Atkinson, being in no way a party to this cause, he was bound to protect her character from attacks of this sort.

The whole of the cross-examination went to show, that the plaintiff's daughter had conducted herself immodestly towards the defendant before the seduction, and that she kept improper company. Several witnesses were then called, on the part of the plaintiff, to prove the general good character, and modest deportment of the plaintiff's daughter, and the general respectability of the family (a).

(a) This controverts the case of *Dodd v. Norris*, 3 Camp. N. P. C. 519, where Lord ELLENBOROUGH ruled, that witnesses, to show the general good character of the daughter, could only be called, if her character had been attacked by witnesses called for the defendant, to prove her general bad character; but if her character was only attacked in her cross-examination, the plaintiff's counsel were only entitled to set it right by her re-examination, and not to call

witnesses to give her a good character: and in that case, her character having been attacked only in her cross-examination, Lord ELLENBOROUGH refused to allow witnesses to be called by the plaintiff's counsel in favor of her general character. The course allowed by Mr. Justice PARK in the present case is much more conducive to the attainment of justice; for it can signify very little, whether the daughter's character is attacked by witnesses, or by cross-exami-

The defendant called no witnesses.

Verdict for the plaintiff, damages £50.

Jervis and Russel, for the plaintiff.

Pearson, for the defendant.

[Attornies—*Hunt and Wood*.]

1823.
BATE
v.
HILL.

BARKER v. TAYLOR.

July 19th.

THIS was an action of trover for a box of clothes, brought by Elizabeth Barker, who sued by *prochein ami*.

Guardians of a female under age are justified in stopping her elopement, and in detaining her clothes if she has eloped; and a carrier by whom she has sent them is justified in delivering them up to the guardians.

The evidence was, that the defendant was a carrier; and a servant of the plaintiff's mother proved the taking the box to the defendant, who promised to deliver it as directed, which was to a milliner's in Newcastle under Lyme. The milliner proved the non-delivery, and a clerk to the plaintiff's attorney proved a demand of the box from the defendant, previous to the action. Some evidence was given to show that the plaintiff *herself* had bought the clothes contained in the box (a).

nation; and if it is right in one case, where it is attacked, to give further evidence, so it must be in the other. Lord ELLENBOROUGH says, that it is to be set right in re-examination: this looks very well in theory. Those used to Courts of Justice well know, that if the character of a party seduced is attacked in her cross-examination, though the witness may deny the things insinuated, a Jury very often believe, that, though denied, there is some foundation for the insinuation, if witnesses are not called to convince them of the con-

trary. It is a little too much, to allow a defendant to blast the character of a person he has seduced by insinuations, and then not to allow her to clear her character by the best means in her power.

(a) In all cases of trover, the defendant must be guilty of an injurious conversion, which is usually proved by a demand of the goods, and a refusal to deliver them: but when there has been a tortious taking by the defendant, a demand is not necessary, though it is safer. *Ross v. Johnson*, 5 Burr. Rep. 2825, decides, that, if the defendant,

1823.
BARKER
v.
TAYLOR.

The defence put in proof was, that the plaintiff had eloped from home, with the assistance of an attorney's clerk, whose acquaintance with the plaintiff (who was under age,) her mother disapproved of. The mother set off in pursuit of her, and on the road overtook the defendant's cart, in which she recognised the box. On her stating the circumstances of the elopement to the defendant, he gave up the box to her: most of this was proved by the plaintiff's mother, who, on *voir dire*, stated that she had given no promise to indemnify the defendant(b). She was therefore admitted as a witness, without any release. The other facts were brought out from the plaintiff's witnesses in cross-examination.

PARK, J., suggested a compromise, which, having been agreed to, his Lordship observed, that he was decidedly of opinion, that in any case, where a female under age attempted an elopement with a person, disapproved of by those under whose guardianship she properly was, they (the guardians) would be perfectly justified in preventing such elopement; and it was equally clear to him, that they would be justified in stopping her clothes. Being of that opinion, he must have held, if the present case had not been compromised, that the carrier was guilty of no tortious conversion in delivering up the plaintiff's clothes to her mother.

A Juror was withdrawn.

(there a wharfinger), had unavoidably lost the goods, that is such an excuse, as to make the refusal to deliver them not tortious. In other cases, other reasons in excuse have been held sufficient, of which the principal case is an example.

(b) Where, on *voir dire*, it has appeared that a witness has promised to pay the expenses of the

party who calls him, to make him competent, the party usually gives him a release of all promises. It is also not uncommon on *voir dire* to find that a witness has subscribed towards the carrying on of the cause. This makes him incompetent; but he is usually rendered admissible by the party, or his attorney, returning him the sum he has subscribed.

Taunton and Russel, for the plaintiff.

Pearson, for the defendant.

1828.
BARKER
v.
TAYLOR.

[Attornies—*Harding* and *Stanley*.]

ASTLE and Another v. THOMAS and Another.

July 19th.

THIS was an action for money had and received; in which the general issue was pleaded.

A parish may legally have two divisions, with churchwardens keeping separate accounts, for each division.

It appeared in evidence, that the parish of Burton on Trent was divided into two tithings, each of which had always elected two churchwardens; who raised separate rates, and kept separate accounts, and were in all respects distinct from the churchwardens of the other tithing. The plaintiffs were the present churchwardens of one of the tithings; and the defendants were their predecessors in office, as churchwardens of that tithing.

This action was brought to recover an alleged balance, in favor of the parish, in the accounts of the defendants: this sum, however, appeared to have been spent on a parish feast. The defendants' counsel did not contend, that churchwardens were justified in laying out the money of the parish in a feast; therefore this sum was treated as money in the defendants' hands; but—

Taunton, contended, that the two plaintiffs could not maintain this action, but that the two present churchwardens of the other tithing ought to have joined in it; because, by law, churchwardens could not be churchwardens of a district or tithing, but were so of the whole parish, and therefore the action could only be maintained by all the four churchwardens of the parish joining in it. He cited the case of *Spitalfields v. Bromley*, (Bott. 208), in proof of his proposition.

1828.

ASTLE
& Another
v.
THOMAS
& Another.

PARK, J.—I think this action can be maintained in its present form; the case cited, shows that the whole of the churchwardens of the parish must act under the circumstances mentioned in that case; but I am aware of no law, which says that a parish may not have two divisions, with churchwardens keeping separate accounts. The plaintiffs were the successors of the defendants; the defendants received this money, as churchwardens of the *division only*, and from that division only; and are therefore liable to account for it to those who are in office for that division only; and not to those who were in for another part of the parish.

Verdict for the plaintiffs.

Pearson and ———, for the plaintiffs.

Taunton, for the defendants.

[Attornies—*Fowler* and *Wright*.]

In the following term, *Taunton* moved for a new trial on these grounds, which was refused by the Court of King's Bench. See 3 Dow. & Ry.

July 19th.

CLARK v. WEBSTER and SALT.

If defendants
 justify shooting
 a dog by plead-
 ing that he at-
 tacked them,
 and that he
 "was accus-
 tomed to attack
 and bite mankind;"

THIS was an action of trespass against the two defendants, for shooting the plaintiff's dog. The defendants pleaded the general issue, and a special plea, which stated "that the dog was accustomed to attack and bite mankind;" that he attacked the two defendants, and the plaintiff may call witnesses to prove the general quietness of the dog.

to save themselves from being bitten and wounded, they were of necessity obliged to shoot the dog. They also pleaded another special plea, which stated, that the dog attacked their dogs; and to save their dogs from being killed, they shot the dog.

1823.
CLARK
v.
WEBSTER
& SALT.

The evidence was, that the dog was running with the plaintiff's waggon, and went into a field where the defendant Webster was shooting, attended by his father's gamekeeper, the other defendant (a); when they saw the dog, Webster shot at him, and missed him; he then took Salt's gun, and with that shot the dog. Evidence was given of the value of the dog.

In anticipation of the defence under the first special plea, the plaintiff called *seven* witnesses, to prove that the dog was of quiet habits.

PARK, J. observed, that if in the course of the cause, there did not appear some good reason for calling such a great number of witnesses, in case the plaintiff obtained a verdict, he should cause the Prothonotary to be ap-

Semble, that where many useless witnesses are called by the successful party, the Judge will cause the

prothonotary to be apprised of it, to guide him in his taxation of costs.

(a) In this case the action was not only against Mr. Webster, who shot the dog, but also against Salt, who was merely in his company as his gamekeeper, and lent him his gun to shoot the dog. It often happens, that persons in Salt's situation are made defendants, because, as such, the real defendant cannot call them as witnesses; and even, if a verdict passes for such added defendant, it is no great loss to the plaintiff, as, in tort, you may recover a verdict against one defendant, though another defendant has the verdict in his favor. But this cannot answer as mere vexation, for if there had been no evidence of participation by Salt, the Judge

would, in his discretion, have directed the Jury, on the application of the defendant's counsel, to find a verdict for Salt, that he might be a witness for Webster. In the case of *Ward v. Waterhouse* and al. in K. B. Mich. Term, 1820, (M S.) BAYLEY, J. said, "The rule is, that where there is no evidence against one of several defendants, he is not to be acquitted, till the other defendants have called all their other witnesses; and if there is then no evidence against him, the Judge will direct his acquittal, and the other defendants may examine him." In the principal case, there was clear evidence of participation by Salt.

1828

CLARK

v.

WEBSTER
& SALT.

prised that only certain witnesses were necessary and material, to guide him in his taxation of costs (*b*).

For the defendants, an attempt was made to show that the dog attacked them; and it was proved, that the dog sometimes stood in the plaintiff's yard, and growled and barked at people, who passed along the adjacent road; but no evidence was given that he had bitten any one. Evidence was given that he had been muzzled at one time, though he was not so at the time he was shot. Evidence was also given, that he had pushed down a man, who carried a pack, by rearing against him.

The allegations
in a plea in an

PARK, J. held, that this evidence did not support the action for shooting a dog, that *he attacked the defendants, and was accustomed to attack and bite mankind*, are both material allegations, and must be proved.

(*b*) Intimations to the prothonotary, of the kind mentioned by his Lordship, would effect in many cases a most salutary reformation in the administration of the law of costs. In a vast number of cases, many insignificant witnesses are brought to the place of trial, when the party bringing them felt sure of the verdict, merely to increase the costs to be paid by the other party. In a case, a very short time ago, where the plaintiff brought an action against his next door neighbour, for encroaching on his land, by building over bounds, to the extent of *six feet in length*, and *five inches in breadth*: feeling sure of a verdict, he gave very long briefs, employed six counsel, and brought upwards of thirty witnesses to the place of trial. The scheme did not succeed, the jury finding for the defendant. A more flagiti-

ous oppression was intended in a case, which occurred in the North. It is said, that a noble Earl brought an action against a celebrated poet, for a trespass; his lordship not only retained but *actually gave a brief* to every barrister, on the Northern Circuit, in number, upwards of sixty: the intention probably was, to put the defendant to the expense of three hundred guineas, for a special retainer: however, the defendant pleaded his own cause. This trick is not new; for, in Rhymer's *Fœdera*, there is a petition of Robert Pickerell, exhibited to the King in parliament, in the second year of Richard the second; in which he complains, that Alice Perrers, (a concubine of Edward the Third,) had retained all the advocates in Westminster-hall, so that he could have no advice: "*si il ne donneroit si grande*"

first special plea, (the only one relied on), because there was no evidence of the material allegation, "that the dog was accustomed to attack and bite mankind." His Lordship, therefore, directed a verdict for the plaintiff, which was given.

1822.
CLARK
v.
WEBSTER
& SALT.

Damages, £5.

Jervis and Campbell, for the plaintiff.

Pearson, for the defendant.

[Attornies—*Flint and Johnson*.]

BEFORE MR. BARON HULLOCK.

ALSOP v. SILVESTER.

July 21st.

THIS was an action for goods sold and delivered; in which the general issue was pleaded.

Agent selling goods, and disclosing the name of the vendee, is not liable for the price to his principal, unless acting under a *del credere* commission.

HULLOCK, B., laid down, that if a person authorises an agent to sell goods, who does so, disclosing to his principal the name of the purchaser, the principal can maintain no action against the agent, for the price of the goods; unless the agent acts under a *del credere* commission (a).

Campbell, and *Caldwell*, for the plaintiff.

Russel and Male, for the defendant.

[Attornies—*Astbury and Fisher*.]

"*summe d'or qu'il ne poit at-*
"*trinder.*"

(a) An agent acting under a *del credere* commission, undertakes to pay his principal for the goods he sells as agent, whether the

vendees pay him or not: so that in fact, he insures the solvency of the vendees to his principal. For this, of course, he has a large percentage.

1823.

BEFORE MR. JUSTICE PARK.

July 22d.

HALLEN v. HOMER.

A trader's abs-
senting himself
from ANY place,
with intent to
delay a creditor,
is an act of
bankruptcy;
and it is imma-
terial whether a
creditor be ac-
tually delayed
or not.

THIS was an action of trover.

The plaintiff had become bankrupt, and the defendant was the sole assignee under the commission. The action was brought to try the validity of the commission. Notice had been given, to dispute the act of bankruptcy, under the statute, 49 Geo. 3. c. 121.

The defendant's counsel admitted the detaining of the goods, and produced, as evidence, the commission, the provisional assignment, and the assignment to the defendant. The trading and petitioning creditor's debt were proved by the production of the proceedings under the commis-
sion (a).

In all cases
where the vali-
dity of a com-
mission of bank-
rupt is tried, e-
very creditor of
the estate is in-
competent as a
witness.

To prove the act of bankruptcy, a creditor was called: he was objected to by Mr. *Jervis*. Mr. *Taunton* contend-
ed, that the witness was admissible, because this was a mere action of trover for goods, and not an action or an issue directed by the Chancellor to try the validity of the commission.

(a) By the statute 49 Geo. 3. c. 121, § 10, it is enacted that in all actions, by or against assignees, the commission and proceedings under it shall be sufficient evidence of the petitioning creditor's debt, the trading, and the act of bankruptcy, unless notice in writing be given to the assignees by the other party, (if defendant, at or before plea; if plaintiff, before issue joined), of his intention of disputing such matters, or any of them. § 11

makes nearly similar provisions for suits in equity, by or against assignees. In proving the proceedings, you ought to produce the commission, and cause the proceedings under it to be produced by the solicitor to the commission, or be prepared with proof of the hand-writing of one of the commissioners, if they are produced by any one else; the assignments are proved as any other deeds.

PARK, J., held, that the witness was clearly incompetent. This was plainly an action to try the validity of the commission; in such an action every creditor was interested. The witness was therefore rejected (b).

1823.
HALLÉN
v
HOMER.

Another witness was called, who proved that the plaintiff did not go as usual to his counting-house, and that the plaintiff had made declarations indicative of his bad circumstances.

Other witnesses were called to prove, that he kept out of the way, and avoided payment of a baker's bill, of 1l. 15s. for which sum the baker often called, but could neither see the plaintiff, nor get his money.

PARK, J., held, that if a trader absented himself from any place, with intent to delay a creditor, though that place was not his house, it was still an act of bankruptcy; and whether in fact a creditor was delayed or not, made no difference, if the evidence satisfied the jury that he absented himself with that intent (c). The baker's bill being so small an amount, was much stronger evidence that the plaintiff was insolvent, than evading the payment of a larger sum. Many a solvent trader might not be always ready to pay a bill of £500, but if he could not pay 1l. 15s. it was presumptive evidence of his insolvency.

Verdict for the defendant.

Jervis and ———, for the plaintiff.

Taunton, for the defendant.

[Attornies—*Richards* and *Patterson*.]

(b) In actions to dispute the validity of a commission of bankruptcy, where it is necessary to call a creditor as a witness in support of the commission, the common practice is, to make him com-

petent by paying him the amount of his debt, which is sometimes done in court, at the trial. In this way the servants of bankrupts often get paid their wages.

(c) In another case, a proprietor

1833.

SHREWSBURY ASSIZES.

(Nisi Prius.)

BEFORE MR. BARON HULLOCK.

July 24th.

GRIFFITHS v. LEE and Others.

In action against carriers for loss of a parcel, the consignee's shopman not knowing of the delivery, and believing that he must have known it, if a delivery had taken place, is *prima facie* evidence of non-delivery.

THIS was an action of assumpsit, for negligence against carriers in losing a parcel, in which the general issue was pleaded.

The plaintiff, a linen draper at Holywell, in Flintshire, had ordered goods from Shrewsbury to be sent by the defendants' stage coach. The consignor of the goods proved the giving the parcel to the defendants' coachman, and that it was directed to the plaintiff, and was worth £15. To show that it never came to hand, the plaintiff's shopman was called, who did not know of the delivery, but believed it could not have been delivered without his knowledge (*a*).

of a theatre, getting behind a scene, to avoid a bailiff, has been held to have committed an act of bankruptcy, as have persons who have either absented themselves from the Royal Exchange, or broken an appointment, *it being proved they had done so to avoid a creditor*: the words of the statute 1 Jac. 1. c. 15, being shall begin to keep house "or otherwise absent him or herself."

(*a*) Actions against carriers must usually be brought by the consignee, as he, on the delivery of the goods to the carrier, has the

property of them, subject, however, to the right of stoppage in transitu. In *Dawes v. Peck*, 8 Ter. Rep. 330, a consignee had ordered goods to be sent by a particular carrier, who lost them. The consignor brought the action. The Court held, that he could not maintain it for the reason above stated. And in *Dutton v. Solomonson*, 3 Bos. & Pul., at page 584, Lord ALVANLEY, in giving the judgment of the Court of Common Pleas, says: "It appeared to me, "to be a proposition as well settled as any in the law, that, if a

The defence set up was, the usual carriers' £5 notice. The shopman of the plaintiff was cross-examined, to show that the plaintiff read the notice in the Chester Chronicle; but he did not know whether the plaintiff read that paper or not. The consignor admitted, that he read that paper, but never observed the notice.

1823.
GRIFFITHS
v.
LEE.

HULLOCK, B., considered, that the evidence of non-delivery was sufficient to call on the defendants to prove a delivery by their porter, or some other witness; because the plaintiff could not be expected to prove a non-delivery better than he has done. As to the proof of notice, that had failed altogether.

Verdict for the plaintiff, damages £15.

Tarnton and ———, for the plaintiff.

Puller and *Russel*, for the defendant.

[Attornies—*Lee* and *Brown*.]

" tradesman order goods to be
" sent by a carrier, *though he does*
" *not name any particular carrier,*
" the moment the goods are de-
" livered to the carrier, it operates
" as a delivery to the purchaser.
" The whole property immediate-
" ly vests in him; *he alone can*
" *bring an action for any injury*
" *done to the goods;* and if any
" accident happen to the goods,
" it is at his risk; *the only excep-*
" *tion to the purchaser's right over*
" *the goods, is, that the vendor, in*
" *case of the former becoming in-*
" *solvent, may stop them in transi-*
" *tu.*" The old way of declaring
against a carrier was, to declare
on the custom of the realm. The

modern practice is, to declare in
assumpsit, in which you can add
the common counts. However,
you cannot add a count in trover;
and, if you declare in *contract*
against too few, it may be pleaded
in abatement; and if against too
many, the plaintiff is nonsuited. If,
on the contrary, you declare for a
tort, you may join a count in tro-
ver, and gain a verdict against
such of the defendants as you can
prove your case against. I should,
however, observe, that, by the
case of *Ross v. Johnson*, 5 Burr.
Rep. 2825, a mere unavoidable
loss of goods by a carrier will not
support the count in trover; the
loss being such an excuse as to

1823

July 24th.

TAPPIN v. BROSTER.

In an action for money paid, laid out & expended, the plaintiff must prove some authority from the defendant to pay the money.

THIS was an action for money laid out and expended; in which the general issue was pleaded.

The plaintiff was guard of the London and Holyhead mail. The defendant resided at Holyhead, and frequently received parcels by that mail. At Shrewsbury, all the parcels are taken out of the mail, and the guard pays the proprietors the carriage of such parcels as he delivers on the journey afterwards: among them were the parcels in question.

The amount paid by the guard was 2l. 15s., which amount, it was alleged, the defendant had never repaid him, though the parcels had been duly delivered.

To support this case, the porter in Shrewsbury proved the replacing the parcels in the coach to go to Holyhead; and the clerk who produced the way-bills, proved the payment of the money to himself by the plaintiff. He also proved, as did the clerk at Holyhead, that the defendant had never complained of the non-delivery of any of the parcels. Another witness proved, that, when he took the account to the defendant, he said, he did not owe the guard any such money; he only owed him 15s.

HULLOCK, B. observed, this was not an action for the carriage of parcels, but for money paid, laid out, and expended by the guard, to the defendant's use. He was clearly of opinion, that the action could not be supported for the whole amount; because there was no evidence that

make the non-delivery not amount to a tortious conversion. It will be proper to take care to avoid the mistake, of intending to declare in tort, and really declaring in contract; for which see the cases of

Goset v. Radnige and others, 3 Ea. Rep. 62; *Powell v. Layton*, 3 Bos. & Pul. 365; *Max v. Roberts*, 2 New. Rep. 454; and S. C. 12 Ea. Rep. 89; and *Weale v. King* and others, 12 Ea. Rep. 452.

the defendant had either authorised or directed the guard to lay out the money on his account; and he conceived that no action for money paid could ever be maintained, unless there was evidence that the money was paid, not only for the defendant's benefit, but by his authority. As to the 15s, as the defendant admitted it to be due, a verdict must be found for the plaintiff for that sum.

1823.
TAPPIN
v.
BROSTER.

Verdict for the plaintiff; damages, 15s.

Taunton and —, for the plaintiff.

Campbell, for the defendant.

[Attornies—*Williams* and *Dax*.]

The Warden and Combrethren of the Crafts of Mercers, Ironmongers, and Goldsmiths, of the Town of Shrewsbury, v. HART.

July 25th.

THIS was an action on the case, brought by the company against the defendant, for carrying on the trade of a Mercer, in the town of Shrewsbury, without being free of this company. There were different counts to vary the name of the company. The general issue was pleaded.

By custom, a company may compel all of their trade to become members.

The plaintiff's counsel opened for nominal damages, the action being brought to try the right.

A company by prescription may have more than one corporate name.

That the defendant had carried on the trade, and was not a freeman, was admitted.

To prove that the company were, and always had been a company, a series of books, containing admissions of freemen, and other acts of the company, were put in. They commenced in the reign of Henry the Sixth, and came down to the present time.

1828.

The chest of a company, kept by the clerk of the company, is proper custody for old documents relating to the company. But the private house of a deceased clerk of the company is not proper custody for a convention temp. Edw. 4, between the Prince of Wales and the company.

These books were produced from a chest, which had always been in the custody of the clerk of the company for the time being: this HULLOCK, B., considered good custody.

A convention between the Prince of Wales and the company, (calling them a company), dated in the reign of Edward the Fourth, was offered in evidence; but this was not taken from the chest, but found in the house of a former clerk of the company after his death. HULLOCK, B., rejected this evidence, as not coming from proper custody (a).

(a) As in ancient documents, the hand-writing never can be proved, to make them admissible evidence, they must be shewn to come from the custody of the person who might be expected to have possession of them, if genuine. Documents from the British Museum, the Bodleian Library, and the collection of Mr. Astle, have been rejected; because it could not be shown that those repositories were connected with the subject matter. In the case before us, the convention between the Prince of Wales and the Mercers' Company, which was evidently in its day a document of importance, was rejected, because it did not come from proper custody; while, in the case of *Bullen v. Michel*, 2 Price Rep. and 4 Dow Rep., a book, called a chartulary, (but which appears to have been merely a sort of memorandum-book), which had belonged to Glastonbury Abbey, was admitted as evidence, to prove the endowment of a vicarage, of which that Abbey were impropiators; because it was found in the posses-

sion of the Marquis of Bath, who succeeded to a large portion of the lands of this abbey. This book was admitted as evidence, though it contained, besides the entry used, a calendar of saints, a history of the giants who inhabited England before the Druids, a pedigree of the Kings of England up to Adam, and a variety of other trash. Where ancient documents are expected against you, it is advisable to be prepared with some one conversant with the old hands, to examine them as they are produced. I know, from considerable experience in reading ancient writings, that the date of a document may be fixed pretty accurately by the style of hand-writing. This is material, not only to detect forgeries, but copies produced as originals. Thus, if a deed, bearing date of Edward the Third's reign is produced, and it is written in hand not used till Queen Elizabeth's reign, it must be either a forgery or a copy, and cannot be a genuine original. Forgeries have also been detected by being written on stamps not in use

Evidence was also given to show that the beadle of the company always attended at the assizes to guard the judges, and that the company had regular officers, regular meetings, entered their acts in a book, and had feasts.

1823.
The Warden,
&c. of Mer-
cers, &c. of
Shrewsbury,
v.
HART.

To prove that mercers at Shrewsbury must belong to the company, a series of entries, beginning in the reign of Henry the Sixth, and continued to the present time, were produced (in the book first mentioned), to show the admission of a great number of mercers to be freemen; and several very old mercers (who had been disfranchised, to make them competent witnesses,) were called, to prove that, till the defendant and a few others resisted, all the mercers in Shrewsbury had been free of the company.

Two petitions to the company, from mercers, were produced from the chest, both dated in the reign of Charles the Second; each petition stated, that the petitioner had carried on the trade of a mercer in Shrewsbury, without being free of the company; that the company had threatened to commence legal proceedings against the petitioner, who expressed his contrition, and asked to be admitted to his freedom; which the admission-book showed had afterwards been done in both cases.

In the evidence, it appeared that the company had not always been called by the same name; sometimes, the Company of Mercers; sometimes, the Mercer's Guild; sometimes, as at the head of the case; and other similar names (b).

No evidence was given on the part of the defendant.

till after the date. I should also recommend, if the document is on paper, to look at the water-mark. A paper was once put into my hand, as an agreement of the reign of Charles the Second: I suspected it, because the hand-writing did not appear to be of that date, I looked for the water-mark,

and found it to be G. R., surmounted by the royal crown.

(b) In an Anon. case, in 3 Salk. Rep. 102, pl. 2, it is laid down by TREBY, C. J., and POWELL, J., that "a corporation, if by prescription, may have several names; but if by charter, it is otherwise."

1828.
The Warden,
&c. of Mer-
cers, &c. of
Shrewsbury
v.
HART

HULLOCK, B., left it to the jury to say, whether the plaintiffs were a company; and whether they were satisfied, that, by custom, all mercers in Shrewsbury must belong to it.

Verdict for the Company on both points.

Campbell and Corbet, for the plaintiffs.

Jervis and Taunton, for the defendant.

[Attornies—*Edgerby* and *Thomas.*]

(*Crown Side.*)

BEFORE MR. JUSTICE PARK.

July 25th.

REX v. HENRY KNIGHT, and ANNE, his wife.

If larceny be jointly committed by husband and wife, the wife is entitled to be acquitted, as under coercion; the woman being indicted as "the wife of A. B." is sufficient proof that she is so, for this purpose.

THESE prisoners were indicted for stealing curtain pins. From the evidence, it appeared, that both the prisoners were in company, at the time of the theft.

PARK, J., directed the jury to acquit the female prisoner, because, if a man and his wife jointly commit a felony, the wife, being presumed in law under his coercion and control, is entitled to an acquittal (a). It was

(a) In all cases, except treason and murder, where a felony is committed by a husband and wife jointly, or by a wife in company with her husband, the wife, being presumed in law under his con-

trol, is entitled to an acquittal. A strong case on this subject occurred on the Midland Circuit, before Mr. Justice BURROUGH: A husband and wife were jointly indicted for a robbery; it appear-

not necessary in this case to adduce evidence to show she was his wife, as it was admitted on the face of the indictment; the prisoners being indicted as "Henry Knight, and Anne, *his wife* (b)."

1823.
 Rex
 v.
 KNIGHT
 & Wife.

ed that the husband was reluctant, but his wife compelled him to go with her and commit the robbery: the learned Judge directed the Jury to acquit the woman, on the ground of coercion; saying, that it was a presumption of law, which he and they were bound by; however, in fact, the coercion might be the contrary way. The woman was acquitted, and the man found guilty. Another strong case is that of Elizabeth Ryan, better known by the name of Paddy Brown's wife, who was tried at the old Bailey, a few years ago, under the statute of 16 Geo. 2, c. 31, for conveying implements of escape to her husband, who was in Newgate, convicted of felony. It appeared, that she procured the instruments in question, by her husband's direction. She was convicted, but afterwards pardoned: it was understood, because the Judges considered that she acted under coercion, though her husband, from being in prison, could not be present. In an indictment for keeping a brothel, husband and wife may be both punished.

(b) In cases where a woman is not indicted, evidence of cohabi-

tation, and reputation of being his wife, would be sufficient, unless rebutted: cases having decided that such evidence, not rebutted, is proof enough of marriage, in all cases except bigamy and *crim con*. Perhaps, before leaving this subject, it ought to be mentioned that Lord HALE, (1 H. P. C. 516,) says: "I take this (coercion) to be only a presumption, till the contrary appear; for I have always thought, that if upon the evidence it can clearly appear, that the wife was not drawn to it by the husband, but that she was the principal actor and inciter of it, she is guilty as well as the husband; but *stabitur presumptio donec probetur in contrarium*." Though this appears to have been the opinion of Lord HALE, the modern practice is, on finding by the evidence that the offence was joint, for the Court to direct the acquittal of the wife, without at all considering or inquiring, how far she was, or was not, the principal actor or inciter of the offence. Indeed, if Lord HALE's rule was acted upon, a wife could hardly ever be acquitted, unless she was under actual compulsion.

1823.

BEFORE MR. JUSTICE PARK.

July 26th.

SANDFORD v. HUNT.

In debt on bond, the only plea being *solvit ad diem*; the execution of the bond is admitted, and the defendant begins.

THIS was an action of debt on a bond; in which *solvit ad diem* was pleaded, without the general issue, or any other plea.

PARK, J., intimated, that the plea of *solvit ad diem* alone admits the bond and execution of it, and that the defendant begins; the affirmative of the issue, payment or no payment, being on him (a).

The evidence not supporting the plea, there was a

Verdict for the plaintiff.

July 26th.

BROWN, Esq. v. GILES.

In civil cases, the Judge will allow the plaintiff's counsel, after he has closed his case, to recall a witness to prove a point omitted to be proved in the proper place.

THIS was an action against the defendant, for breaking the plaintiff's close with dogs, &c., and trampling down his grass in a certain close, called Bryant's close, in the parish of A., on divers days. The defendant pleaded the general issue.

The usual notice not to trespass was proved; and a witness proved, that, after the notice, he saw the defendant walking down the turnpike road, and his dog jumped into the field, called Bryant's close.

(a) In almost all cases, where the affirmative of the issue lies on the defendant, he begins; but this in practice is not very common, as al-

most always, with an affirmative plea, the defendant pleads the general issue, which calls on the plaintiff for some proof.

1823.

A dog jumping into a field, without the consent of its master, is not a trespass, for which an action will lie.

PARK, J., was decidedly of opinion, that the dog jumping into the field, without the consent of its master, not only was not a wilful trespass, but was no trespass at all, on which an action could be maintained; he should therefore nonsuit the plaintiff (a).

A person was then called, who stated that the defendant admitted, that he had gone at another time, since the notice, into Bryant's close, but that he claimed a right of way there. No plea of right of way was put on the record.

This was the case for the plaintiff.

Pearson, objected, that there was no evidence, that the close was in the possession of the plaintiff.

Campbell, said, he had only omitted to prove it, from supposing it could not be disputed; he, therefore, hoped the learned Judge would allow him to call a witness to prove it.

Pearson strongly objected to this, and stated, that some years since he had defended a man at Stafford, for burg-

(a) No action lies for damage done by a person's dog, without the person's concurrence, or a knowledge of bad propensities in the dog, even where there is considerable actual damage, as sheep biting &c. In general, no action lies for an involuntary trespass. The oldest case on the subject is in the year-book of 37 Hen. 6, 37, pl. 26, which decides, that if a man is assaulted, and when in danger runs through the close of another, not keeping the footpath, no action lies; it being necessary for his preservation. It is laid down in 2 Roll. Ab. 566, pl. 1,

that if cattle, in passage on the highway, eat herbs or corn *raptim et sparsim*, against the will of the owner, it will excuse the trespass. In *Millen v. Faudry*, Poph. 161, the defendant's dog chased the plaintiff's sheep; defendant called him off: held, that no action lay. In *Beckwith, Esq. v. Shardikey and Hatch*, 4 Burr. Rep. 2092, the Court lay down, that, if a person goes along a footpath, and his dog happens to escape from him and run into a paddock, and pull down a deer against his will, it is no trespass.

1823.
BROWN
v.
GILES.

lary; whom two King's counsel were brought from the other Court to prosecute. When they had closed their case, he objected, that there was no evidence that the house had been shut up the night before. The prosecutor's counsel said, they had forgotten to prove it, and wished to recall a witness, as Mr. *Campbell* did, but the learned Judge would not allow it; and the prisoner was therefore acquitted.

PARK, J., after some hesitation, allowed a witness to be recalled, observing that this was not a criminal case like that cited by Mr. *Pearson* (b).

A witness being recalled, proved the close to be in the occupation of the plaintiff, and that it was in the parish and county, laid in the declaration.

Verdict for the plaintiff; damages, One Farthing.

The learned Judge refused to certify.

(b) A plaintiff has been allowed in a penal action, under a statute, to supply proof which his counsel had omitted to bring forward before closing his case. The case of—, Clk. v. Sir *Montague Burgoyne*, Bart., tried at Chelmsford, was an action of debt, for £20 per month, for not going to church, under the statute of 23 Eliz. c. 1. There the plaintiff's counsel forgot to prove that Sir Montague lived in the parish; but was permitted to recall a witness to prove this, after he had closed his case. Sir Montague then entered on his defence, which was under the 12th section of that statute, which makes it an excuse that divine ser-

vice should be performed in the defendant's house: on which a verdict was given in his favour. It may at first sight appear strange, that the defendant, in the principal case, did not put the plea of right of way on the record: but he was properly advised to omit it; because you should never justify a frivolous trespass, unless you are sure of success; since, if the justification is found against you, with only *nominal damages* it carries *full costs*. The same rule applies where a battery is justified, and the plea fails: but if the *assault only* is justified, and that justification fails, it does not of necessity carry full costs.

Campbell and Ryan, for the plaintiff.

Pearson, for the defendant.

1823.
BROWN
v.
GILK.

[Attornies—*Hardwick, and Collins.*]

LYSTER, Esq. v. BROWN and Others.

July 28th.

THIS was an action of debt, on the third section of the statute 11 Geo. 2, c. 19, against the defendant, George Brown, for double value of goods fraudulently removed from a farm, of which he was tenant to the plaintiff, to prevent a distress for rent, and against the other defendants, his sons, for aiding and assisting him. Plea—The general issue.

In action of debt, on the 11 Geo. 2, c. 19. against a tenant for fraudulently removing his goods, to avoid a distress; it is immaterial whether the removal is in the night or not; or with concealment or not. Evidence that the tenant's sons removed the goods with his consent, will support a declaration against him for removing the goods, and them for assisting him in such removal.

To support the action, the plaintiff's steward proved that George Brown was tenant of the farm, of which the plaintiff was landlord; and that he was upwards of £500 in arrear of rent; that he had often threatened Brown with a distress.

Evidence was given to show, that great quantities of farming stock were removed; some to a farm of one of the sons, some to other places: and circumstances and declarations of all the defendants, to convince the Jury of the fraudulent intent. Evidence was also given of the small and insufficient value of the goods left on the premises, and of the value of the goods taken away.

From the cross-examination, it appeared that the goods were not removed in the night, or with any particular concealment.

PARK, J., intimated, that the removal in the night, or with concealment, were not necessary to support the ac-

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 LYTTER
 v.
 BROWN
 & ORR.

tion; and therefore this was only evidence to rebut the evidence of fraudulent intent.

It appeared that the removal was effected by the sons, without any active participation by the father, who only appeared to be privy and consenting to the removal.

Taunton objected, that that put an end to the action; because the statute only gave the penalty in cases where the removal was by the tenant, assisted by others; here, on the evidence, it was just the reverse (*a*).

PARK, J., thought, that, if the sons removed the goods, with the father's consent, all were equally principals; or a tenant, who was afflicted with the gout, might have his goods fraudulently removed with impunity. His Lordship then left it to the jury to say, whether they thought the removal fraudulent; and, if so, they would say whether the removal was by the sons alone, with the privity and consent of the father.

The jury found for the plaintiff, stating the removal to be by the sons *only*, with the father's privity and consent.

The learned Judge gave Mr. *Taunton* leave to enter a nonsuit, in case the Court above should be with him on his objection.

(*a*) The words of the 3rd section of the statute 11 Geo. 2, c. 19, are: "To deter tenants from fraudulently conveying away their goods and chattels, and others from wilfully aiding or assisting therein." It is enacted, "that if any such tenant or lessee shall fraudulently remove, and convey away his or her goods or chattels as aforesaid, or if

"any person or persons shall wilfully and knowingly aid or assist any such tenant or lessee, in such fraudulent conveying away, or carrying off any part of his or her goods or chattels, or in concealing the same, all and every person and persons so offending, shall forfeit and pay, &c."

Campbell and ———, for the plaintiff.

Taunton, for the defendants.

[Attornies—*Lloyd* and *Wheeler*.]

1823.
 ~~~~~  
 Lyster  
 v.  
 Brown  
 & Ora.

In the following Michaelmas Term, *Pearson* moved to enter a nonsuit on the point reserved by Mr. Justice PARK; but the Court of King's Bench, concurring with the opinion of Mr. Justice PARK, refused the rule.

BEFORE MR. BARON HULLOCK.

DOR, on the joint and several Demises of the Minister, Churchwardens, and Overseers of the Poor of the Parish of St. Julian, Shrewsbury, *v.* COWLEY. July 29th.

**THIS** was an ejectment to recover a certain quantity of land, situate in Fish-Street, Shrewsbury, in the parish of St. Julian. The land in question was really the soil of part of the street itself.

Ejectment cannot be brought against a person for setting up a stall in a street. The remedy is an action of trespass by the owner of the soil.

The facts were these:—The defendant had for some years erected stalls in Fish-street, on market days, and he had used the churchyard-wall as the back of his stalls: for this use of their wall he had paid the parish of St. Julian £5 a-year. The lessors of the plaintiff had given him notice to quit, and he ceased to use the wall, and built his stalls in the street, with wooden backs, three inches from the wall. The present ejectment was brought, the parish alleging that the soil of the street was their freehold, as far

1823.

DoE, on the  
Demises of the  
Minister, &c.  
of St. Julian,  
Shrewsbury,  
v.  
COWLEY.

as the middle, in like manner as the soil of a river to the  
*filum aquæ* (a).

HULLOCK, B. had never heard before of an ejectment for a street, and was decidedly of opinion that it would not lie, if the soil of the street did belong to the parish, and there would be some difficulty in proving that. The proper way would be for them to bring an action of trespass for disturbing their soil, as is done in cases of disturbance of mines, where a public road runs over the surface of the land.

Plaintiffs nonsuited.

July 29th.

REX v. EDMOND WHITCOMB, Gent., one of the Coroners  
of Shropshire.

Information a-  
gainst a coroner  
for corruption

in his office, who was found guilty. The judge refused to commit the defendant, or to hold him to bail, no disposition to abscond being shown.

(a) The case of the *Mayor, &c. of Northampton v. Ward*, 2 Str. Rep. 1238, and 1 Wils. Rep. 107, was an action of trespass *quare clausum fregit*, for breaking the plaintiff's close, called Butcher Row, and erecting a stall there. The defendant pleaded, that it was a market, and that he entered and put up a stall there to sell his meat: Replication, that the plaintiffs were seized in fee of the soil and market; and that the defendant, without leave, and of his own wrong, entered and set up a stall. To this there was a demurrer. The case was argued

three times before the Court of King's Bench; and it was contended, that the defendant had a right to put up a stall in the market, and that trespass was not the proper action. *Per Curiam*—No person has a right to set up a stall in a market, without paying a compensation to the owner of the soil; and if one does wrongfully place a stall there, an action of trespass is the proper remedy for the owner of the soil. He cannot bring debt or assumpsit, as there is no certain duty or implied contract. The case of the *Mayor, &c. of Norwich v. Swan*, 2 Bl. Rep. 1116, is pre-

1823.  
 Rex  
 v.  
 Whitcomb.

Salop, as such coroner held an inquest on one Sarah Newton, who was murdered by John Newton, her husband; of which murder John Newton was convicted; and that the defendant corruptly, and for lucre and gain, secretly examined several of the witnesses, before the swearing of the jury; that he, knowing Newton to be suspected of the murder, corruptly agreed with him to persuade the jury, that he was not the cause of his wife's death; that he corruptly dismissed twelve of the twenty-four jurors summoned; that he corruptly omitted to examine a witness, whose evidence he was apprised of; and prevented the jury from viewing the body. The other counts, fourteen in number, charged each of these corrupt acts separately, and in different ways. Plea—Not guilty.

Witnesses were called to prove the facts charged, and circumstances to induce the jury to infer corruption. An examined copy of the record of conviction of John Newton, for murder, was put in (a); and the original record of the inquisition on the body of Sarah Newton, under the hands and seals of the defendant, as coroner, and of the jurors (b).

For the defence, witnesses were called to disprove the circumstances charged, and the corruption; one of whom was cross-examined as to an affidavit he had made contradictory of his present statement. The affidavit was read: it was an affidavit made by the witness in the Court of King's Bench, and used in the showing cause against the rule *nisi* for the present information (c).

cisely similar, except that there the defendant placed a table to sell his goods upon, instead of erecting a stall.

(a) You get this by applying at the office of the clerk of assize of the circuit, for an office copy of the record you want, and let-

ting a witness, who will attend the trial, examine such copy with the original record.

(b) This record was produced by the clerk of assize.

(c) The way to get the original of any affidavit from the crown office, for the purpose of produc-

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 REX  
 v.  
 WHITCOMB.

The defendant's counsel also put in the original depositions taken before the defendant at the inquest.

HULLOCK, B., left the evidence of the facts, and the corrupt motive to the jury.

Verdict—Guilty.

*Pearson* asked that the defendant should give bail for his appearance to receive judgment.

HULLOCK, B., stated, that where no disposition to abscond was manifested, the application was quite unusual, and declined making any such order.

*Pearson* then asked for the defendant's own recognizances, which the learned Baron also declined ordering (*d*).

*Pearson, Campbell, Russel, and Ryan*, for the prosecution.

*Peake, Serjt., Jervis, Puller, and Corbet*, for the defendant.

[Attornies—*Lordale and Collins*.]

ing it in evidence on a trial, is to cause an office copy of it to be taken; the attorney in the cause in which it is to be produced, (or other proper person), then gives an undertaking to return the original affidavit as soon as used. He is (on one of the clerks in court obtaining a judge's order for that purpose, which order is granted on a statement of the facts,) per-

mitted, to take it away, leaving the office copy and the undertaking in its place till it is returned.

(*d*) In some of the cases of blasphemous libel, I have known the defendant committed, or held to bail for his appearance to receive judgment, though no particular disposition to escape has been manifested.

HEREFORD ASSIZES.

(*Crown Side.*)

BEFORE MR. BARON HULLOCK.

REX v. THOMAS HALLOWAY.

July 31st

**THE** indictment in this case charged the prisoner with stealing *one brass furnace, at the Parish of Brilley, in the county of Hereford.*

*Variance.*—An indictment for stealing “a brass furnace” in the county of H. is not supported by evidence of stealing a brass furnace in the county of R. and breaking it there, and bringing the pieces into H. shire,

From the evidence, it appeared, that the prisoner had stolen the furnace at a place called Clowes, in the county of Radnor, and that he carried it a little way, and then broke it, bringing the fragments into the county of Hereford. It appeared that Clowes, and the place at which he broke the furnace, were both more than five hundred yards from the boundary of the county of Hereford (a).

HULLOCK, B., directed an acquittal, and said: Though a prisoner may be indicted for a larceny in any county, into which he takes stolen property, the present indictment must fail, as he never had the “*brass furnace*” in Herefordshire, or within five hundred yards of its boundaries: he merely had there, certain pieces of brass (b).

Verdict—Not Guilty.

(a) By the statute 59 Geo. 3, c. 96, § 2, it is enacted, that in any indictment for felony committed on the boundary of two or more counties, or within five hundred yards of the boundary, it shall be

sufficient to lay the offence in either.

(b) With regard to description of stolen property in an indictment, it is particularly necessary to be precise. Nothing is so com-

1828

July 31st.

SAME v. SAME.

*Variance.*—An indictment for stealing two turkies, not supported by proof of stealing two dead turkies.

**T**HE same prisoner was also indicted for stealing “two turkies.” [See Note (b) to the preceding case.]

mon as for the clearest cases to fail from a mis-description of this kind. I need not mention the well known cases of a man, indicted for stealing a pair of stockings, being acquitted, because the stockings were proved to be odd ones; or of the person acquitted of stealing a duck, because in proof it turned out to be a drake. I was present at the acquittal of a man for forgery, in altering a *levari facias* from the county court, because it was called in the indictment a writ; a *levari facias* from the county court not being a writ, but only a warrant from the sheriff to his officer. It is best, at least in one count, to call the thing stolen by the same name the witnesses will call it in their evidence. When an animal is described in an indictment by its name only, without the epithet *dead*, it will be considered to be alive. An indictment for stealing a horse would be but ill supported by proof of stealing a dead horse. The nearest case that I recollect to have met with is *Rough's* case, in Mr. East's Pleas of the Crown, where the prisoner was indicted for stealing a pheasant of the value of forty shillings, of the goods and chattels of the prosecutor: the twelve Judges held, that, from

the description, it must be taken to be a pheasant alive, and so *ferre naturæ*; and, to show it to be a felony, the indictment should state it to have been dead or reclaimed; and the stating it to be of the goods and chattels, did not supply the deficiency. Perhaps the most curious distinction between living and dead is, that the stealing the skin of a dog, like stealing any other skin from the furrier, is a larceny; whereas stealing the living dog, which is the skin and something more, is no larceny; dogs being considered in law of a base nature, and not subject to larceny. In actions against lords of manors for taking away game, the declaration usually is, that the defendant, “with force and arms, seized, took, and carried away” so many “dead hares,” &c. *Bird v. Dale*, 7 Taunt. Rep. 560, and *Churchward v. Studdy*, 14 Ea. Rep. 249, are instances of this. It may be said, that, in actions for penalties, for having game in possession, it is not usual to state that the defendant had a dead hare in his possession, but merely a hare. I apprehend the reason is, that this being an action on a statute, it is considered sufficient to follow the words of it.

In evidence the turkies appeared to have been dead turkies, stolen from a larder.

1823.

REX

v.

HALLOWAY.

HULLOCK, B., ruled, that this indictment could not be supported; for "*two turkies*" must be taken to mean live turkies. It ought to have been for stealing two dead turkies.

Verdict—Not Guilty.

REX v. GEORGE TYLER and JOHN FINCH.

July 31st.

**THESE** prisoners were indicted for breaking into a house in the day-time, no person being therein.

*Curwood* offered to prove a confession of the prisoner Finch, made to a constable.

*Sir W. Owen*, for the prisoners, wished to show that the prisoner Finch, being locked up alone in a room at a public-house, was told by *a man*, that the other prisoner had told all, and he had better do the same to save his neck: and that on this the prisoner Finch confessed (a).

Confession of a prisoner to a constable, who had held out no inducement, is evidence; tho' an inducement had been previously held out by a person in no office or authority.

HULLOCK, B., held, that as the promise (if any) was by a person wholly without authority, the subsequent confession to the constable, who had held out no inducement,

(a) When the supposed confession was proved, it appeared that the prisoner said, that a man had told him, he had better tell all, for the other prisoner had confessed; but that he would not say a word, for he came too far north. Here w

see a man's refusal to confess, nearly as strong evidence against him, as if he had actually confessed. See the case of *Rex v. Elizabeth Gibbons*, supra, and the notes to that case.



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REX

v.

TYLER  
& FINCH.

must be considered as voluntary, and was therefore evidence.

Verdict—Guilty.

*Curwood*, for the prosecution.

*Sir W. Owen*, for the prisoner.

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(*Civil side.*)

BEFORE MR. JUSTICE PARK.

July 31st.

DOE, on the Demise of DAVIS, v. DAVIS.

A second son, who was living with his father at the time of his death, holding possession of his father's house, levies a fine with proclamations. The eldest son need not make an actual entry to avoid this fine.

THE plaintiff was the eldest, and the defendant the second son of a Mr. Davis, who was seized in fee of the house for which the present ejectment was brought. It appeared that the defendant had lived with his father for some time previous to his death, at the house in question, and continued to reside in the house after the father's death, when he levied a fine with proclamations, which was proved; and the defendant's counsel contended, that he must succeed, as there had been no actual entry by the lessor of the plaintiff; but—

PARK, J., considered such entry unnecessary, as the second son merely continued in the house he had rightfully resided in during his father's lifetime; and that he was not seized of the freehold rightfully, or by disseizin. His lordship therefore directed a

Verdict for the plaintiff.

DOE, on the  
Demise of  
DAVIS,

v.  
DAVIS.

Nov. 22nd.

A rule nisi for a new trial having been obtained, and the case argued in the Court of Exchequer—

GRAHAM, B., now delivered the opinion of the Court—  
In this case a second son is left in possession at the death of his father, and levies a fine. The question is, whether he has a freehold by disseizin. A person, to levy a fine, must either have a freehold by right or by wrong. And if by wrong the cases show, that the possession must be adverse. There must be a wrong in the original entry. Now here the defendant was permitted to enter by his father, which is clearly not a tortious entry; and in *Doe v. Perkins*, Lord ELLENBOROUGH and the rest of the Court held, that if a man held over on a lease, and a descent was cast, the entry was not tolled; because the possession of the defendant's ancestor did not originate tortiously. We are therefore of opinion, that the present defendant's possession was not a disseizin of the freehold (a).

Rule discharged.

(a) In the case of *Doe v. Perkins*, 3 M. & S., a lessee for years of a tenant for life, who had died, levied a fine. Lord ELLENBOROUGH, in giving judgment, says, that in order to constitute a disseizin, there must be a wrongful entry. A wrongful continuance in possession is not a disseizin; and a fine by such a person will not require an entry to avoid it; and a descent cast will not toll the entry: and in *Wil-*

*liams v. Thomas*, 12 East, 255, Lord ELLENBOROUGH lays down, that a devisee of a tenant for life, entering and receiving the rents, is not a disseizor; for such a person might not do it adversely, nor even know of the claim of the lessor of the plaintiff. However, in the case of *Lee Compere v. Hicks*, 7 T. R. 727, it is laid down, that after a fine levied by a tenant for life, there must be an entry before ejectment brought.

1823.

August 1st.

WATLING v. WALTERS.

A deputy overseer, or even a mere stranger, directing a surgeon to attend a poor man, is liable to pay the surgeon.

**THIS** was an action by a surgeon for work and labour in attending a third person. Plea—General issue.

In evidence, it appeared, that a pauper, in the parish of which defendant was deputy overseer of the poor, (not an assistant overseer under 59 Geo. 3. cap. 12,) met with a serious accident; it was proved that the plaintiff attended him, and that the charges were fair.

Whether an overseer is liable to pay a surgeon who attends a pauper without a retainer—*quære?*  
A deputy overseer is not.

PARK, J., said, that, without deciding whether or not an action could be maintained against the overseer of a parish by a surgeon, for attending a pauper, he was of opinion that the defendant being a mere deputy overseer, this action could not be maintained against him, without some evidence of a retainer (a).

(a) No case has yet decided, that an overseer is compellable to pay a surgeon's bill, for attending a pauper of his parish, unless there has been an order by him, or a subsequent promise, or a knowledge of the attendance, and an acquiescence in it. It has been contended, that the moral obligation of the overseer to provide physic for a pauper, is sufficient by itself to raise an implied assumpsit; but the tendency of the cases is to show, that this is a good consideration for a promise, but does not of itself amount even to an implied promise. See *Watson v. Turner*, Bull. N. P. *Wennal v. Adney*, 3 Bos. & Pull. 247, *Atkins v. Banwell*, 2 Ea. Rep. 505 and *Lamb v. Bunce*, 4 M. & S. 275. Cases have also decided that

a pauper hurt is casual poor, wherever he then happens to be, and *that* parish is bound to provide assistance for him, which the parish he is legally settled in is not bound to reimburse: this is laid down in the cases of *Atkins v. Banwell*, and *Lamb v. Bunce*. I ought here to mention the case of *Sneath v. Tomkins*, in the Court of King's Bench, from the Norfolk Circuit, in Trinity Term, 1822; in which, in an action for a surgeon's bill, it appeared that a pauper legally settled in the parish of A. met with an accident in the parish of B., where he was attended by the plaintiff, a surgeon; after the attendance, the defendant, who was overseer of A., in which the pauper was settled gave an express promise to pay

Evidence was then given, that the defendant had sent a person to the plaintiff to say, that if he would attend the pauper, he (the defendant) would pay him.

The defence attempted was, that the order was given not by the defendant, but by a Mr. Insol; this wholly failed.

PARK, J., was clearly of opinion, that if a deputy overseer, or even a mere stranger directed a surgeon to attend a poor man, such person was clearly liable to pay the surgeon.

Verdict for the plaintiff; damages, £15.

*Maule and Davis*, for the plaintiff.

*Russel*, for the defendant.

[Attornies—*Harris and Warburton*.]

## MONMOUTH ASSIZES.

(*Civil Side.*)

FOTHERGILL and Others v. JONES.

August 8th

**THIS** was an action for goods sold and delivered, in which the general issue only was pleaded, and no notice of set-off given.

A defendant cannot reduce a plaintiff's demand for goods sold by pro-

ducing a debtor and creditor account in the hand-writing of the plaintiff's clerk, showing goods sold by defendant to plaintiff, unless he has pleaded or given notice of set-off.

the plaintiff. At the trial the point of liability was reserved. In the Court above it was contended that the pauper being casual poor in B., the parish of A. had nothing to do with his cure; the Court recommended a compromise, which was acceded to; when it was in-

timated from the Bench, that two of the Judges thought it highly doubtful, whether, as the pauper was casual poor in B. there was any consideration for a subsequent promise by the overseer of A., and they had very great doubts whether the action could be main-

1823.  
 FOTHERGILL  
 & ORS.  
 v.  
 JONES.

From the evidence it appeared, that the plaintiffs were owners of iron works; and also kept a general shop for groceries, &c. to supply their own men, and other persons who might deal there. The defendant was a shoemaker: it appeared that the defendant dealt at the shop, and that the plaintiffs bought shoes of him for themselves and their men, and that each party kept a book, in which the opposite party wrote every dealing between them.

The plaintiffs' shopman was called to prove the delivery of groceries, and the defendant's counsel put into his hand a book, which he admitted contained a true account of groceries delivered on one side, and shoes delivered on the other; the whole being of the witness's hand-writing.

It was objected, that this account of shoes could not be set off, as no notice of set-off had been given (a).

*Puller*, for the defendant, contended, that as the plaintiffs' servant wrote the account, the shoe bill was so much written off the plaintiffs' account, just the same as if that amount had been paid in money.

HULLOCK, B. ruled, that though it might have been as Mr. *Puller* contended, if a balance had been struck between the parties; as it was, it was merely an account of a grocer's bill on one side, and a shoe bill on the other; just the common case of mutual debts, which could not be set off without a plea or notice of set-off; which not having been given here, the defendant could not avail himself of the

tained, as this promise came within the rule of *nudum pactum*.

(a) In country causes a set-off is sometimes pleaded, instead of notice being given of it, which has the advantage of saving the expense of a witness to prove the no-

tice; and as the notice ought to be as precise as the plea, there seems little disadvantage in so doing. But if pleaded, it is usual to plead also the general issue, so that you must be at the expense of leave to plead double, &c.

claim for shoes. His lordship recommended a compromise, which ended in a

1823.

ROTHENGE LL  
& ORR,

v.  
JONES.

Verdict for the plaintiff, for the balance.

*Taunton and Campbell*, for the plaintiffs.

*Puller and Cross*, for the defendant.

[Attornies—*Smith and Davis*.]

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GLOUCESTER ASSIZES.

(*Civil Side*).

BEFORE MR. JUSTICE PARK.

FREEMAN v. ARKELL.

August 11th.

**THIS** was an action against the defendant, for maliciously charging the plaintiff with an assault before a Magistrate, on which he was committed to prison; and on a bill being presented to the Grand Jury by the defendant, it was by them ignored. This charge was variously laid in three counts; a fourth count charged, that the defendant maliciously indicted the plaintiff, saying nothing of the proceedings before the Magistrate. Plea—Not guilty.

A plaintiff is not at liberty to give secondary evidence of the contents of a document, if his witnesses trace it to a person not connected with the cause, without calling that person.

For the plaintiff, Dr. Timbrell a Magistrate, was called to produce the information warrant, and depositions before him concerning the assault; he having had a sub-

1828.  
 FREEMAN  
 v.  
 ARKELL.

*poena duces tecum*, for that purpose. This witness stated, that he had returned them to the Quarter Sessions, and had given them to Mr. Bloxsome, the deputy Clerk of the Peace, or to Mr. B.'s clerk, who assisted him at the Quarter Sessions.

Mr. Bloxsome was called, he stated that he had no recollection of receiving the papers in question; they were not to be found after diligent search in the Clerk of the Peace office.

The plaintiff's counsel, wished his Lordship to admit secondary evidence.

PARK, J.—You have not called Mr. Bloxsome's clerk.

Pearson, replied, that they did not know of his existence; they called the Magistrate and the acting Clerk of the Peace, the only accredited officers; if they had them not, he submitted the plaintiff was entitled to give secondary evidence.

PARK, J.—If they were lost, the plaintiff would be entitled to do so; but, as it is, for aught that appears, the clerk may have them now in his possession (a).

(a) In the case of Judge JOHNSON, 7 Ea. Rep. 66, and the other cases, where secondary evidence was admitted, there was strong reason to presume, that the writing was really destroyed; but the case most like the present was *Rex v. The inhabitants of Castleton*, 6 Ter. Rep. 236, where it was necessary to prove an indenture of apprenticeship of Martha Pidley: Nicholas Tims, her master, when called, stated, that he had delivered it to a Miss Taylor of Bomford, to whom he had made a parol assignment of the

apprentice. Evidence was given that Miss Taylor, who was living, but not called, had said she could not find it. The Sessions would not admit secondary evidence, because Miss Taylor was not called to prove the loss. The Court above thought the case too clear for argument, and that if the indenture could not be produced, evidence must be brought to show that it was lost or destroyed. Here it was traced to Miss Taylor, and no further evidence given. The Court then confirmed the decision of the Session.

*Pearson* then intimated his intention of proceeding on the fourth count; he recalled Mr. Bloxsome, who produced the bill ignored, (not a copy) (*b*); and called one of the Grand Jury, who proved that the defendant was the prosecutor on it (*c*).

1823.

In action for malicious prosecution, the plaintiff may call one of the Grand Jury, to prove that the defendant was Prosecutor on the indictment.

*Taunton*, objected, that, on the record, in setting out the indictment, there was a variance; the record being, "then and there did make an assault;" the indictment, "did then and there make an assault."

PARK, J. said, it had been amended on a summons before him that morning, but he thought it no variance, even if it had not been amended. The plaintiff had at the same time amended, by altering a mistake in the record of "plaintiff" for "defendant" (*d*).

Semble, that in action for malicious prosecution, the record, in setting out the indictment, saying "then and there did

"make an assault;" the indictment really saying, "did then and there make an assault," is no variance. However, the Judge at the assizes will allow it to be amended, on summons; as he will, the word "plaintiff," for the word "defendant," in the record.

(*b*) You cannot, in an action for malicious prosecution for felony, obtain a copy of the indictment except by application to the Court, where the trial took place; and an order from that Court for it, or else a *fiat*, to the same effect, from the Attorney General: but this is not so on an action for a malicious indictment for a misdemeanor. In *Morrison v. Kelly*, 1 Bl. Rep. 385, the Clerk of the Peace of Westminster was *subpoenaed*; and he produced the original record of acquittal: it was objected, that a copy, by order of the Court where it took place, should have been produced; Lord MANSFIELD said, that it was so in felony, but otherwise in misdemeanor. But even in felony, it was held in *Leggett v. Tollervey*, 14 Ea. Rep. 302, that if the officer produced the record, or you could prove an

authenticated copy, it was evidence, though not obtained by order or *fiat*; but a discreet officer would apply to the Court, and state the circumstances, before he produced the record, or gave a copy.

(*c*) This is generally proved by calling one of the Grand Jury; a Grand Juror may be called to prove any substantive fact within his knowledge, but not any thing which he hears as a Grand Juror, or which comes within his oath of secrecy.

(*d*) Any small or verbal error, or omission in the record, can be rectified by applying to the Judge of *Nisi prius*, at his lodgings, and getting a summons from him, for the other attorney to show cause: he then, after hearing both attorneys, will, in his discretion, give an order for the alterations. The re-



1823.

And in such actions, the question of what is probable cause or not, is a question for the judge.

His Lordship said, that the question of probable cause or not, was a question for the Judge (c); and that the fact of a bill being thrown out, was no proof of a want of probable cause.

*Pearson* said, he should also prove that there was in fact no assault.

The Judge thought the proceedings before the Magistrate formed so leading a feature of the case, that it could not be made out without them. His Lordship therefore

Nonsuited the plaintiff.

*Pearson and Godson*, for the plaintiff.

*Taunton*, for the defendant.

[Attornies—*Godson* and *Fryer*.]

In Michaelmas Term, 1823, *Pearson* moved for a rule nisi for a new trial, which was granted; and at the sit-

cord is then altered by the attorney accordingly, and he pins on the Judge's order, as his justification for so doing. Besides alterations like the present, I have known an order given in an action against the Hundred, for the demolition of a house in a riot, for inserting in the record after the day in the declaration, the words "and at divers other days and times." Formerly, none but a Judge of the Court that the record came from, could do this; and if no Judge of that Court was on that Circuit, the attorney was obliged

to go on with the blunders, or to go to another Circuit to find a Judge of that Court. To remedy which, by the statute 1 Geo. 4, c. 66, § 5, it is enacted, that a Judge of either of the three superior Courts should, on the Circuit, make such orders on summonses, as he might do, if he were a Judge of the Court that the record came from.

(c) That the question of probable cause, is a question for the Judge and not for the Jury, was settled in the case of *Golding v. Crowle*, Say. Rep. 1: *DANFORTH, J.*

tings of the Judges under the King's warrant, before Hilary Term, 1824, the rule for a new trial was made absolute.

1828.  
FREEMAN  
v.  
ARKELL.

HARPER v. COOK.

Aug. 11th.

**THIS** was an action against the defendant, that, he and the plaintiff being joint collectors of King's taxes for the parish of Mitchel Dean, the defendant maliciously made an affidavit, that the plaintiff was a defaulter for taxes, whereby his goods were seized. Plea—General issue.

A plaintiff may give secondary evidence of the contents of a written paper, if those in whose possession it was, proved that they had made diligent search for it, and could not find it.

The commissioner, (Rev. Mr. Crawley), before whom the affidavit was made, and his clerk, Mr. Lucas, proving that it could not be found after diligent search, the learned Judge admitted parol evidence of its contents.

Verdict for the defendant, the want of probable cause not being sufficiently made out.

*Tunton and Curwood*, for the plaintiff.

*Jervis and Campbell*, for the defendant.

[Attornies—*Williams & Goddard* and *Lucas*.]

held at the trial, and the Court above confirmed it. And in the opinions of Lords MANSFIELD and LUTHERBOROUGH, reported in *Sutton v. Johnstone*, 1 Ter. Rep. 545, it is laid down, that "the question of probable cause, is a mixed proposition of law and fact: Whether the circumstances al-

leged to show it probable, or not probable, are true, and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law; and upon this distinction proceeded the case of *Reynolds v. Kennedy*, 1 Wils. Rep. 232."

1823.

Aug. 13th.

PREWIT v. TILLY.

In trespass  
*quare clausum  
fregit*, if the de-  
fendant justifies  
*inter alia*, that  
the *locus* is a  
free wharf for  
the inhabitants  
of O. an in-  
habitant of O.  
is an incomp-  
etent witness;  
but if the de-  
fendant's coun-  
sel consent to  
wave that plea,  
he is competent.

**THIS** was an action of trespass, *quare clausum fregit*.  
Pleas—The general issue, and several justifications; one  
of which alleged a right of free wharfage on the *locus in  
quo*, in the inhabitants of Oldbury in the parish of Thorn-  
bury.

One of the witnesses for the defence was examined on  
*voir dire*, by Mr. Taunton. He admitted that he was an  
inhabitant of Oldbury.

The learned Judge held him not a competent witness—  
But, on the defendant's counsel consenting to abandon  
the plea laying the right of wharfage as above, (of which  
abandonment the associate made a memorandum on the  
back of the record), the witness's evidence was admit-  
ted.

Verdict for the plaintiff.

Taunton and ———, for the plaintiff.

Ludlow and Cross, for the defendant.

[Attornies—Rolph and Jefferies.]

HARVEY v. REYNOLDS.

**THIS** was an action for injuring the plaintiff's right of common, at Horsley, by the defendant's building a cottage on the common. The defence was—leave and licence by the plaintiff.

Leave and licence to build a cottage on a common given by a commoner by parol. He can bring no action for the encroachment, tho' no sufficient common is left.

It appeared in evidence, that the plaintiff was a farmer, and had a right of common in the *locus*, and that the defendant built a cottage there in the year 1821. It was admitted on all sides, that no sufficient common remained: but it appeared, that in August, 1822, there was a perambulation by the lord of the manor and freeholders, (among whom was the plaintiff), for the purpose of examining what encroachments had been made. It was then proposed that the defendant, for this encroachment, should pay to the lord 15s. a-year, when the *plaintiff himself* asked that defendant should pay but 10s. a-year, and have a lease of it from the lord for ninety-nine years; and directions were given for such lease to be prepared: but in Michaelmas Term, 1822, before any lease was executed, the plaintiff brought his present action.

PARK, J., was of opinion that these facts clearly amounted to leave and licence; and the plaintiff was therefore nonsuited, with leave to enter a verdict for the plaintiff, with nominal damages, in case the Court above should be of opinion, that these facts did not amount to leave and licence.

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*Jervis*, having obtained a rule *nisi* for entering a verdict for the plaintiff—

Nov. 22nd.

1822.  
HARVEY  
v.  
REYNOLDS.

*Tawnton* and *Campbell* now showed cause, and relied principally on the case of *Winter v. Brockwell*.

*Jervis* and *Ludlow*, in support of the rule, contended, that these facts did not amount to a licence: for that, in fact, the plaintiff gives up his right of common without any equivalent, and that there was no evidence that the agreement for the 10s. rent was ever carried into effect; and at most it was only a conditional licence; and the condition (the executing a lease) had not been performed.

HULLOCK, B.—I conceive that it was a licence, as soon as all parties had agreed at the perambulation.

GRAHAM, B.—The plaintiff was competent to give this licence, as far as regards his own rights. He gives the licence on certain terms; every thing is in train for complying with the terms, which is all that could be at the time the action was brought: but the plaintiff, instead of giving the defendant an opportunity of fulfilling the condition, brings an action. I think he was properly nonsuited.

GARROW, B., was of the same opinion.

HULLOCK, B.—This case does not come exactly within that of *Winter* and *Brockwell*, which has been confirmed by other cases; but I think the nonsuit was right. I do not think that a commoner's expressing no dissent to an encroachment, at all bars his action as a licence. If the plaintiff had not acceded to the arrangement at the perambulation, I think he could have maintained this action; but on that occasion he himself makes a proposition for the encroachment continuing on a certain payment being made: this is agreed to; and if the money is not paid,

the defendant is liable to pay it. I think the nonsuit was right.

Rule discharged.

1823.

HARVEY

REYNOLDS.

In the case of *Winter v. Brockwell*, 8 East, 308, the plaintiff had given the defendant leave to put a skylight over his area, and afterwards, not liking it, he (plaintiff) had given the defendant notice to remove it. At the trial, Lord ELLENBOROUGH held, that the licence being executed, it could not be revoked, at least not without the plaintiff's putting the defendant into his original situation, by paying him the expense he had been at in putting up the

skylight. And on a motion for a new trial, his Lordship expressed the same opinion, and cited the case of *Web v. Paternoster*, Palmer 71, where HAUGHTON, J. lays down, that a licence executed is not countermandable, but only when executory. In *Taylor v. Waters*, 7 Taunt. 374, the case of *Winter v. Brockwell* is confirmed; and the Court decide, that a licence to be exercised on land, need not be by deed, nor even by writing.



# CASES

AT

## NISI PRIUS.

AT THE

*Sittings after Hilary Term.*

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### COURT OF KING'S BENCH.

*Sittings at Guildhall, after Hilary Term, 1824.*

BEFORE LORD CHIEF JUSTICE ABBOTT.

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### PROMOTIONS.

IN this vacation, Lord GIFFORD, Lord Chief Justice of the Court of Common Pleas, was appointed Master of the Rolls, *vice* Sir THOMAS PLUMER, Knight, deceased; and Sir WILLIAM DRAPER BEST, Knight, one of the Judges of the Court of King's Bench, was appointed Lord Chief Justice of the Court of Common Pleas, *vice* Lord GIFFORD; and JOSEPH LITLEDALE, Esq. was appointed a Judge of the Court of King's Bench, *vice* Lord Chief Justice BEST.

1824

In Easter Term, WILLIAM ST. JULIEN ARABIN, Esq. and THOMAS WILDE, Esq. were called to the degree of Serjeant at Law.



1824.  


Feb. 14th.

COSTER v. SYMONS, otherwise SHERWOOD.

A letter written by the indorser of a bill, is evidence for the defendant in an action by indorsee against acceptor.

**T**HIS was an action on a bill of exchange, drawn by one Shaw, on, and accepted by, the defendant, and indorsed by Shaw to a person named Akers, and by Akers to the plaintiff.

The *prima facie* case having been made out—

For the defendant it was proved, that he was merely the servant of Shaw, the drawer, and had no consideration for his acceptance; and that another bill had been given by Shaw to Akers, with his (Shaw's) name upon it, but to which the defendant was no party; which bill, it was contended, was in lieu of that on which the action was brought. And to prove that Akers knew of, and consented to such arrangement, it was proposed to read a letter addressed by him to Shaw, which Shaw swore related to the transaction in question.

*Gazellee*, for the plaintiff, objected.—Akers is in existence, and may be called. I admit we are bound by any act of Akers, but not by what he says.

ABBOTT, C. J.—I think, in a case at the last sittings, I admitted evidence of a similar description; and I believe the question is now before the Court, on a motion for a new trial. I will take a note of the objection.

The letter was then read. It contained a request to Shaw to bring the second bill with him, and concluded with these words, "this will take out Sherwood entirely."

ABBOTT, C. J.—I think I ought to receive this evidence. It is a declaration of the party under whom the plaintiff claims title, shewing that he had no title at all. Shaw

put his name on the second bill to assist Sherwood, and Akers consents to this arrangement.

1824.  
COSTER  
v.  
SYMONS.

Akers was then called by the plaintiff's counsel; but his explanation not being satisfactory, the jury, under his lordship's direction, found a

Verdict for the defendant.

*Gazelee*, for the plaintiff.

*Scarlett and Campbell*, for the defendant.

[Attornies—*Hodgson and Blackstock & Bunce.*]

**M' SHANE v. GILL.**

*Feb. 17th.*

**WORK** and labor. The plaintiff in this action, who had been a bankrupt, claimed the sum of 34*l.* 4*s.* from the defendant;—30*l.* for procuring the sale, at a certain sum, of his (the bankrupt's) house to the defendant, and 4*l.* 4*s.* for letting it after the purchase, in the capacity of a house agent. The 4*l.* 4*s.* had been tendered.

An agreement between a bankrupt and a third person, that the bankrupt shall receive a sum of money from such third person on his obtaining from his assignees the sale of his house to that person, at a certain price, is void in law.

A witness proved a conversation which took place between the plaintiff and defendant. The defendant wished to purchase the house, and the plaintiff said to him, "Let us have a clear understanding: if you become a purchaser either by your own bidding or mine, I shall expect 30*l.*, or five per cent. provided your purchase-money is under 600*l.*" The defendant said, "Certainly, you shall have 30*l.*; but do not limit yourself within a few pounds of the 600*l.*"

1824  
M'SHANE  
v.  
GILL.

ABBOTT, C. J.—If I understand this rightly, it is a bargain between the bankrupt and a purchaser, to obtain the property for him at a certain sum, in consideration of 30l.?

The plaintiff's counsel replied in the affirmative.

ABBOTT, C. J.—Then I am of opinion it is void in law: even though the assignees had consented, it is a fraud on all the creditors except them.

The plaintiff's counsel then examined one of the assignees, who stated that the plaintiff called upon him at his house.

The defendant's counsel objected to any thing that passed when the defendant was not present.

ABBOTT, C. J.—The plaintiff's counsel thinks that if he proves the consent of the assignees to the agreement, it will be good; and he is setting about doing it.

The assignee stated that the plaintiff told him he had a friend who was coming to purchase the house, and if the assignees would give that friend the preference, he (the plaintiff) would have an interest in it. The property was eventually sold to the defendant for 560l., the assignees conceiving that it was bought for the plaintiff. It appeared that a meeting of creditors agreed to the price, at the bankrupt's suggestion.

The occupier of the house proved the letting of it to him by the plaintiff, as the defendant's agent.

ABBOTT, C. J.—I am clearly of opinion that an agreement, by which any person is enabled to buy the property at a certain sum, on giving the bankrupt 30l., is void in

law. A communication of the agreement to all the creditors might make a difference, but a communication to the assignees alone will not do. But in this case there has been no communication to either, of any thing like the contract spoken to the witness. His lordship then called upon the defendant's counsel to prove the tender of the 4*l.* 4*s.* for the letting, which being done

1824.  
M'SHANE  
v.  
GILL.

The plaintiff was nonsuited.

*Marryatt and Chitty*, for the plaintiff.

*Scarlett and D. Pollock*, for the defendant.

[Attornies—*Sabine and Hughes.*]

HOUGH and Another *v.* WARR.

Feb. 18th.

**ACTION** on a bond against the defendant, as surety of the collector to the Bloomsbury Dispensary, of which the plaintiffs were the treasurers. Plea—General issue.

A witness proved the execution of the bond, and the collector himself proved his being a defaulter to the amount of between £200 and £300.

The defendant's counsel inquired whether his lordship thought a letter addressed by the defendant to the committee of the Dispensary, previous to the deficit, stating that he should not consider himself bound beyond the date of that letter, and that he had informed the collector of such his determination, could avail him in that action, or whether he must go into equity for relief.

A letter from a surety for a collector to the obligees of his bond, stating that he will not be liable after the date of the letter, is no defence to an action on the bond for a deficit, subsequent to the letter, if it be not pleaded specially. If it be pleaded, *Quære.*

ABBOTT, C. J.—I think he must go into equity. His

1824.  
 HOUGH  
 & Another  
 v.  
 WARR.

lordship inquired if it had been pleaded, and was answered in the negative.

The defendant's counsel.—Does your lordship think, that after such a notice they can be considered to have trusted the collector under the bond.

ABBOTT, C. J.—I think they may till it is revoked. At all events you should have pleaded it (a).

Verdict for the plaintiff.

*Nolan and Richards* for the plaintiff.

The *Attorney General* and *Storks* for the defendant.

[Attornies—*Pasmore* and *Mills*.]

(a) In *Whelpdale's* case, 5 Rep. 119a. it is laid down, that in all cases where a bond is voidable, as if made by an infant or person under duress, and also in cases where a bond is made void by act of Parliament, it must be specially pleaded, and the year books (1 H. 7. 15, and 9 Edw. 4. 5), are cited in support of this position; but if it ceases to be a deed, as by erasure, the plea of *non est factum* is sufficient.

In *Lambert v. Atkins*, 2 Camp. 272, evidence that the obligor was, at the time of giving the bond, a *feme covert*, was admitted under the general issue. And in *Faulder v. Jervoise*, 3 Camp. 126, lunacy was allowed to be given in evidence, in action of debt on bond, under the general issue. The cases also go to shew, that if the bond was void at common law,

it may be taken advantage of under the general issue, but if it is void by statute, or is only voidable either by common law or statute, such matter must be specially pleaded; and in practice, infancy, gaming, usury, &c. always are so. I see no objection to pleading almost any matter of defence specially to debt on bond, as it makes no great difference in costs, whether you plead the general issue or a special plea, unless the plea be very long. It should be observed, that in debt on bond, the general issue is, *non est factum*, and not *nil debet*; and if the latter is pleaded by mistake (as it very often is), the plaintiff may demur. In this form of action, payment must be pleaded specially; and so must a release.

1824.

**RUSSEN v. LUCAS and Another, Sheriff of Middlesex.** Feb. 19th.

**ACTION** against the sheriff for an escape. The only point in dispute was, whether a person named Hamer was arrested by the sheriff's officer, and escaped.

The officer having the warrant went to the One Tun tavern in Jermyn street, where Hamer was sitting. He said, "Mr. Hamer, I want you." Hamer replied "wait for me outside the door, and I will come to you." The officer went out to wait, and Hamer went out at another door, and got away.

Words such as "I arrest you" *per se* will not constitute an arrest; but if, after the words of arrest, the party goes with the officer, and so acquiesces, it is an arrest.

**ABBOTT, C. J.**—Mere words will not constitute an arrest; and if the officer says, "I arrest you," and the party runs away, it is no escape; but if the party acquiesces in the arrest, and goes with the officer, it will be a good arrest. If Hamer had gone even into the passage with the officer, the arrest would have been complete: but, on these facts, if I had been applied to for an escape-warrant I would not have granted it (a).

Nonsuit.

*Marryatt and Tindal*, for the plaintiff.

*The Attorney General and Holt*, for the defendant.

[Attornies—*Russen and Smith & Buckerfield.*]

(a) In the case of *Horner v. Bat-  
tyn & others*, 12 Geo. 2, (mentioned in B. N. P. 62,) it was held that if there be no actual touching of the party, but he acquiesces in the arrest, and goes with the officer, it is an arrest; therefore the question in the principal case was, whether directing the officer to go and wait for him, was not an acquiescence in the arrest,

though it certainly appears to have been not an acquiescence, but a trial to evade the officer, and run away. In *Gener v. Spark*, 1 Salk. 79, it was held, that if the officer had touched the party to be arrested, and the party had instantly run away, this would have been a perfect arrest, and the running away of consequence an escape.

1824

Feb. 19th.

BEYNON *v.* GARRAT and VENABLES, Sheriffs of London.

If, after a sheriff has returned to a *fi. fa.* for £301, that he has levied only £13, the plaintiff goes and receives that £13, he cannot maintain an action for a false return.

**THIS** was an action for a false return to a *fi. fa.* issued at the suit of the plaintiff, against a man named Rees, for £301. The sheriffs returned that they had levied £13.

The formal proofs having been gone through, evidence was given to show the return was false.

The defence was, that the plaintiff had gone to the secondary's office, and received the £13. Mr. Collinridge, the secondary, proved that he advised him to consider before he received the money, as it would wave any further claim he might have against the sheriffs. However, the plaintiff took the money.

ARBOTT, C. J. The plaintiff by accepting this money has in point of law waved all further claim against the sheriffs.

Plaintiff nonsuited.

[Attornies—*Lichfield* and *James*.]

Feb. 23rd.

DOE, on the Demise of SORE, *v.* EYKINS.

If a lessor, after a forfeiture, advises a person to purchase the term of his lessee, he cannot maintain an ejectment for such forfeiture against that purchaser; but otherwise, if the party have an interest, *e. g.* an annuity secured on the premises, and the advice is "to take to them," merely.

**EJECTMENT** to recover the possession of some houses on account of the lease of them being forfeited by their not being finished, fit for habitation, within a time specified in the lease of them, granted by the plaintiff to a person named Bayley, who had assigned the lease to the defendant.

The *prima facie* case being made out —

For the defendant, a witness was called, who said, "I was present at an interview between the lessor of plaintiff and

"present at an interview between the lessor of plaintiff and

"the defendant. The defendant began to repeat a conversation which had taken place between her and Sore on London-Bridge, in which she said he advised her to purchase the premises of Bayley. He did not expressly deny it, but appeared to be very uneasy, and said, I did not advise you to become the tenant; I advised you to take to the premises." On the witness's cross-examination he said, "that the defendant had an annuity from Bayley, secured on the premises in question, which she had got before the conversation which was alleged to have taken place on London-Bridge."

1824.  
DOE, on the  
Demise of  
SORE,  
v.  
EYKINS.

ABBOTT, C. J.—If the conversation had been, as was supposed on the part of the defendant, that Sore advised her to purchase the premises, I quite agree, that, as against her, he would have no right to insist on the forfeiture; that is, if he advised her to take an interest, she having no interest before: but the advice he gave her was, "to take to the premises." She had an annuity secured on them, and was in consequence interested to get the houses finished. In point of law the plaintiff is entitled to a verdict, having made out his case.

Verdict for the plaintiff.

*Scarlett and Chitty* for the plaintiff.

The *Common Sergeant* for the defendant.

[Attornies—*Rich* and *F. & H. Martin*.]

The courts always lean against forfeitures, and therefore, when a forfeiture has taken place, if the landlord does any act *after notice of the forfeiture*, to wave it, he cannot subsequently take advantage of it. Receiving or dis-

training for rent is a waiver of all antecedent forfeitures which the landlord knew of at the time. But in *Doe, d. of Skeppard, v. Allen*, 3 Taunt. 78, where the lease was to be forfeited, if the tenant assigned to a butcher, it



1894

Feb. 26th.

WILLIAMS and Others v. MUDIE and Others.

An attorney is bound to disclose communications made to him, which do not regard either the bringing or defending an action.

**THE** plaintiffs in this action were wholesale stationers, and sought to recover from the defendants, as proprietors of the Leeds Gazette, the amount of their bill for stamps and paper, furnished at various times, for the carrying on of that concern. The difficulty was in proving the partnership of the defendants. The plaintiff's counsel, after examining a variety of witnesses, were driven to the necessity of calling the attorney for the defendants. He was questioned as to certain communications made to him at former periods, when he was concerned for them professionally, but not with a view to any cause. He appealed to the Court to say whether he was obliged to answer.

ABBOTT, C. J., held, that he was bound to disclose such communications as were made to him by the defendants previous to this action. Whatever, said his lordship, is communicated for the purpose of bringing or defending an action, is privileged, but not otherwise. This was held in a case on the Midland Circuit in the time of Serjeant Adair.

*Scarlett*, for the defendant.—I am aware that your lordship has admitted evidence of a similar description several times before, and that your lordship has laid down the rule more liberally than your predecessors; but I submit that the law is clear, that any communication, whether about an estate or otherwise, is a privileged communication. It was so decided by Lord Hardwick, in the case of the conveyancer to the East-India Company.

ABBOTT, C. J.—I have considered the subject a great deal, and my mind is made up upon it.

The witness was then examined, but the answers he gave not establishing the partnership, and there being no further evidence on the subject, the plaintiff was nonsuited (a).

1824  
 WILLIAMS  
 and Others  
 v.  
 MUDIE  
 and Others.

*F. Pollock and Wilde*, for the plaintiffs.

*Scarlett and Alderson*, for the defendants.

[Attornies—*Tilson & P.* and *Robinson, Son, & Battye.*]

(a) The case of *Wilson v. Rastel*, 4 T. R. 753, decides that confidential communications to counsel, attornies, and solicitors, in those capacities, are privileged. But in *Cobden v. Kendrick*, 4 T. R. 431, the Court say, that the difference is, whether the communication were made by the client to his attorney in confidence, as instructions for conducting his cause, or *gratis dictum*. If it was not the former, the communication is admissible in evidence. In *Rex v. Withers*, 2 Camp. 578, it was ruled by Lord ELLENBOROUGH, that if a party who is assaulted go to an attorney to consult him on it, such attorney cannot be allowed to give evidence of that communication on an indictment for that assault, to shew that the prosecutor gave a dif-

ferent account of the transaction. In *Fountain & Another v. Young*, 6 Esp. 113, a party had sent for the witness, supposing him to be an attorney, and made a confidential communication to him as such. The witness was really clerk of the papers in Newgate; but had formerly been clerk to an attorney. MANSFIELD, C.J. held, that the privilege was only as to attornies, and that no such privilege extended to persons situated as the witness was. In *De Barre v. Livette*, Peake, N. P. C. 77, Lord KENYON held, that the interpreter, through whom a party, who was a foreigner, communicated with his attorney relative to the party's defence at the Old Bailey, on a charge of felony, could not be permitted to give evidence of such communications.

1824.

Feb. 27th.

DOE, on the Demise of PITT, v. HOGG.

The depositing a lease in the hands of brewers, for money lent, is not within the meaning of a proviso for re-entry, which is to take effect if the lessee, his executors, &c. should "grant any underlease, or assign, transfer, and set over, or otherwise part with the lease or premises, without licence."

**EJECTMENT** to recover possession of the Grigsby's Coffee-House, in consequence of the forfeiture of the lease under a proviso for re-entry, which was to take effect if the lessee, his executors, &c. should grant any underlease of the premises, or "alien, sell, assign, transfer, and set over, or otherwise part with the lease or premises, without the licence of the lessor."

It appeared that the lessee, having occasion to borrow some money of Messrs. Combe & Co. the brewers, deposited the lease in their hands, and Messrs. Combe & Co., on the receipt from Messrs. Reid & Co. of the sum advanced, delivered it over to them.

*Scarlett*, for the plaintiff, contended, that this was within the meaning of the proviso, it being a parting with the lease.

*Gurney*, for the defendant.—I submit that the parting in this case was only a parting with the manual possession; and a parting with it, to work a forfeiture, must be a parting with the property of the lease. It is, in fact, no more than depositing it at a banker's. The lessor has not guarded against a mere deposit. And he cited the case of *Doe and Bevan*, 3 M. & S. 353 (a).

(a) The great point made on *Doe, d. Goodbehere, v. Bevan*, 3 M. & S. 353, was, whether the assignees of a bankrupt selling a term under an order of the Lord Chancellor had incurred a forfeiture under the words in the lease, that "the lessee, his executors, admi-

nistrators, and assigns, should not during the term assign the indenture, or his or their interest therein." And the Court held, that the term "assigns" must be taken to mean voluntary assigns, and not assigns by operation of law.

*Scarlett*, in reply.—The distinction between this case and the one cited is, that in the latter the words of the proviso only applied to an assigning; but in the former they include both a legal parting, and any other parting, with the lease. The deposit communicates an interest to the party receiving it.

1824  
Doe,  
on the Demise  
of Pitt,  
v.  
Hogg.

ABBOTT, C. J.—I think, upon the whole, it will not do. Mr. *Scarlett* shall have leave to move to enter a verdict for the plaintiff.

Nonsuit.

*Scarlett* and *Adams* for the plaintiff.

*Gurney* and *Hutchinson* for the defendant.

[Attornies—*Adlington & G.* and *Whitton.*]

In Easter Term *Scarlett* moved, pursuant to the liberty reserved at the trial, and the Court refused his application.

### DITCHER v. KENRICK.

Feb. 27th.

**T**HIS was an action of covenant. An attorney was called, and required to produce the deed. He said he had it only in his character of attorney for a third person, and appealed to the Court whether he was bound to produce it. ABBOTT, C. J. thought he was not, and told the plaintiff's counsel they might give other evidence. A witness was then called, who produced an attested copy.

In action of covenant, the attorney of a third person who holds the deed as such, is not bound to produce it, but the plaintiff may go into secondary evidence. An at-

tested copy, on 1s. stamp, is admissible as secondary evidence.

1824  
  
 DITCHER  
 v.  
 KENRICK.

The defendant's counsel submitted that there be two parts of the deed.

ABBOTT, C. J.—I shall not presume there is part; it must be shewn.

The attorney was then recalled, and said, there were two parts, and one was delivered over to Mr. who had been the plaintiff's attorney, but was since The attested copy appeared to have been made at the office of the witness, who declined to produce the original.

The witness then proved having searched at chambers for the deed without success.

The attested copy was then about to be read, when the defendant's counsel further objected, that it had not the proper stamp, being only marked with a small stamp; whereas the act requires that a copy made of a party to a deed must have the same stamp as the original itself.

The plaintiff's counsel replied, that the observation was true where the copy was produced as original evidence but in the present case it was only offered as secondary proof.

ABBOTT, C. J. over-ruled the objection, and there being no other answer to the case, a verdict was found for the plaintiff (a).

*Nolan and Goulburn* for the plaintiff.

*E. Lawes* for the defendant.

[Attornies—*Monins & Beckett*, and *Wimburn & Collett*

|                                                                                                                                                                                                              |                                                                                                                                                                                                   |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>(a) By 55 Geo. 3. 184. (the stamp act) it is enacted, that every attested copy of any agreement, bond, instrument of conveyance, or other deed, shall bear the same stamp as the original instrument,</p> | <p>if made for the security of any person taking benefit under such instrument; but, if the benefit of any person is not taking benefit under the instrument, it is to bear a shilling stamp.</p> |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

1824.

## GILL v. CUBITTS and Others.

**THIS** was an action against the defendants, as the acceptors of a bill of exchange. The handwriting of the parties was proved.

For the defendant it was proved, that on the 20th of August, the bill in question, with two others, was sent in a parcel directed to Birmingham, and stolen from the coach.

A bill broker cannot recover in an action against the acceptor of a bill indorsed generally, if he discounted it under circumstances which ought to have excited suspicion in his mind.

Gurney, for the plaintiff, then called the plaintiff's clerk, who proved, that his master was a bill broker, that the bill in question was brought to their house to be discounted, soon after nine in the morning of the 21st of August, the plaintiff being then in the country. The witness knew the features of the person who brought it, but did not know his name. He introduced himself as a person who had before brought banker's bills to be discounted. The witness declined discounting the bill, saying, he did not know the parties to it, (meaning the defendants, the acceptors). Upon which, the person who brought it, said, if inquiry were made, the parties would be found to be respectable, and left the bill, and returned in about two hours, during which time the respectability of the acceptors had been ascertained, and the bill was then discounted. The man indorsed his name as Charles Taylor, and then the money was paid him. His appearance was respectable. The bill was discounted with the money of Sparks and Co. of Exeter, and sent to their town bankers, with these words on the back—"If necessary, refer to 42, Lombard Street," which was the plaintiff's residence. The bill was afterwards returned, and paid by the plaintiff. On the witness's cross-examination, he admitted that he had made no inquiry as to the address of the person who brought the bill; and the reason he gave was, that he supposed they had it, when he said he had brought bills before. He also stated, that it was not

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their practice to ask the bringer how he came by a bill, and that he did not take the numbers of the notes with which he discounted the bill. On his re-examination, he said, that inquiry is usually made, if the person is not known, and that the money was paid, *minus* the discount and 2s. the plaintiff's charge.

*Scarlett*, for the defendants, said, he did not mean to contend that the plaintiff was any party to the stealing of the bill, but he thought that his plan of leaving a young man in his office, with power to discount for any one whose features he happened to know, without his name being put on the bill, to make him responsible, was very dangerous and improper. It was very much like keeping a shop to invite thieves to come and dispose of their stolen property. He submitted that this was such negligence on the part of the plaintiff, as should throw upon him the loss.

*Gurney*, in reply—If the principle contended for by Mr. *Scarlett*, were admitted to be correct, it would lead to consequences most dangerous to commerce. He cannot impeach the plaintiff's character, but says, that there was want of caution on his part, and therefore he ought to suffer. Now, I contend, that Mr. Everett, the drawer, has shewn the first instance of want of caution, and it is not denied that he is the real defendant, and not the Messrs. Cubitts. Everett might have indorsed the bill specially, and then a title could only have been derived to it, by means of a capital felony. It is impossible for a bill broker to know the address of all the persons for whom he discounts. The real question is this—has the plaintiff paid the consideration, and acted *bona fide* in the matter? Who ever heard of a bill broker putting his name on a bill for his 2s. commission. He cited the case of *Lawson & Weston*, 4 Esp. 56, and contended, that the circumstances in that case were stronger against the plaintiff than in this, and yet he had

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a verdict. He thought that the circumstance of the money being paid for the discount, was a proof that the plaintiff had acted *bona fide*, and submitted on the principle of the case he had cited, and the law of which he believed had never been doubted, that no man would be safe unless he were entitled to recover after having given a valuable consideration, without notice of the commission of any fraud.

ABBOTT, C. J.—This is an action on a bill of exchange drawn by one Everett, and accepted by the defendants; made payable by Everett to his own order, and indorsed generally. The plaintiff contented himself in the first instance, as he had a right, and as it was prudent to do, with the mere formal proof of the handwriting of the parties. For the defendants, it has been shewn, that the bill was stolen. The question, as it seems to me, is, Did the plaintiff take this bill under circumstances which ought to have excited suspicion in his mind? for if he did so, I am of opinion that the verdict should be for the defendant. On the evidence, it appears that there is nothing peculiar to the bill itself which is calculated to excite suspicion. But there is something in the plaintiff's mode of conducting his business, which in my opinion is calculated to excite suspicion. It appears to be his habit to discount bills, if the features of the party bringing them are known, and the names of the acceptors respectable. Now, what would any one think, if he were walking by the Royal Exchange, and were to see a notice stuck up in these words—"Bills having respectable names upon them, brought by persons whose features are known, discounted here, without any inquiry as to the bringer." I confess, I have myself a strong feeling upon the subject. We are (as was very properly observed by the learned counsel for the plaintiff,) to take care that we do not throw difficulties in the way of the circulation of paper securities, because the commerce of the country is very much benefited by them, but we ought also to take care,



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that business shall not be conducted in such a way, as to give encouragement to persons to steal them, by affording facilities for the disposal of them afterwards. These two considerations lie one on the one side, and one on the other. If, either from the circumstances of the bill itself, or the method of doing business, want of proper and reasonable caution on the part of the plaintiff is evinced, then I think the verdict ought to be for the defendants. It appears, also, to be a singular fact, that the numbers of the notes with which the bill was discounted have not been kept.

Verdict for the defendants.

*Gurney* and *F. Pollock*, for the plaintiff.

*Scarlett*, for the defendants.

[Attornies—*Young* and *Willoughby*.]

In the ensuing term *Gurney* obtained a rule *nisi* for a new trial.

In the case of *Lawson v. Weston*, 4 Esp. 56, a bill, with a general indorsement, had been lost by the holder; and the plaintiffs, who were bankers, had discounted it in the usual course of their business, for a person they did not

know, without any knowledge of the loss. Lord *KENYON* permitted them to recover against the acceptor on their proving the consideration they had given, which his lordship thought necessary.

March 1st.

**HORNCastle and Another v. MOAT.**

Declaration in tort, stating that the defendant, on the sale of Tenerife Barilla, asserted that 7½ cwt. would produce a ton of soap, well

knowing it would not do so, is not supported by evidence that he said he had made 7 tons of soap out of 51 cwt. and no proof of the scienter.

**THE** declaration in this case stated, that the plaintiffs bargained with the defendant for some Tenerife Barilla, and that the defendant asserted of it, that 7½ cwt. would make a ton of soap, well knowing that it would not do so: whereby the plaintiff was induced to take it, and in consequence sustained a loss. The defendant pleaded

the general issue. The Lord Chief Justice inquired if the declaration was in *tort*, and was answered in the affirmative.

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For the plaintiff, the broker, who purchased the article, was called; who proved that the defendant produced a sample, and said that he could speak to its goodness, for he had used it, and made 7 ton of soap with 51 cwt. The sample was taken to the plaintiff's, and tried by their process, and approved.

The contract was then read. It specified merely the date, the parties' names, the quantity sold, the price, and the mode of payment.

ABBOTT, C. J., [inquired what evidence there was to prove the *scienter*.

The plaintiff's counsel replied, that he had no other evidence than the difference between the quality of the sample and that of the bulk.

ABBOTT, C. J.—If there had been any warranty in the contract, or any thing saying that the bulk was to be like the sample, then that might do. But I cannot infer a fraud, or ask the Jury to infer a fraud, because the result of one man's experiment differs from that of another's. Besides, in the declaration it is laid, that he asserted that 7½ cwt. would make a ton, whereas the proof is, that he said, 51 cwt. had produced 7 tons. It might be true, as to the larger quantity, and not as to the smaller. As there is no warranty, the plaintiff must be called (a).

Nonsuit.

*Gurney and Platt*, for the plaintiffs.

*Scarlett*, for the defendant.

[Attornies—*Orchard and Rogers*.]

(a) In cases of this sort the declaration is usually not in *tort*, but in contract, that the defendant assured, and faithfully promised, &c. and you add the common money counts.

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DAMER v. LANGTON.

In an action for work and labour, when the plaintiff has established a *quantum meruit*, if the defendant's witness prove the existence of a written contract, and the plaintiff insist on the defendant's producing it, and it is not produced, the plaintiff must be called: but if the plaintiff does not require its production, the case may proceed.

**THIS** was an action to recover the sum of 10*l.* 10*s.* for erecting a tent, or temporary room, on the defendant's lawn. The plaintiff's witnesses established a *quantum meruit*, and on the cross-examination of the defendant's agent, who was called for the defendant, and who had negotiated with the plaintiff in the affair, it came out, that he had written the terms in his book, which had been signed by the plaintiff.

*Park*, for the plaintiff, submitted, that this must be produced by the defendant.

*Marryatt*, for the defendant, observed, that if there was any contract, the plaintiff wanted it as much as the defendant.

ABBOTT, C. J. inquired of *Park* if he meant to call for it.

*Park* said, certainly not, but he should insist on the defendant's producing it.

ABBOTT, C. J.—If you insist that there is a written contract, then I think that the plaintiff must be nonsuited.

*Park* submitted, that the rule was settled, that if on the cross-examination of the plaintiff's witnesses, it came out that there is a written contract, the plaintiff, in such case, must be nonsuited. But when the plaintiff has proved a *quantum meruit*, and the fact of the existence of such contract comes out in the progress of the defendant's case, then he is bound to produce it.

ABBOTT, C. J.—You cannot go on a *quantum meruit* if there is a written contract. If you insist on the contract, I think the plaintiff must be called.

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*Park* then withdrew his objection, and the case went on, as if there had been no written contract.

Verdict for the plaintiff.

*Park*, for the plaintiff.

*Marryatt*, for the defendant.

[Attornies, *D. Willoughby* and *Mason*.]

DUNCAN v. GARRATT and Another.

March 3rd.

**ACTION** against the defendants as Sheriffs of Middlesex. The plaintiff purchased at a sale, under an execution, two-thirds of a vessel, in the month of August. The sails were described in the inventory, as being at a sail-maker's, of the name of Watson. The plaintiff received an order from the sheriff, on Watson, for the delivery of the sails, but did not present it till the month of May following, after he had sold the two-thirds to Messrs. Ellerby and Cound, and bound himself to deliver the sails to them, or pay 60%. The sail-maker refused to deliver them up, saying he had a lien on them, and the plaintiff paid the 60% to Ellerby's, and gave notice to the sheriff, that he should require the production of the sails, or hold him liable for the money he had been obliged to pay. It appeared that the sail-maker said, when the sheriff's officer seized the sails, that he had no charge for repairing them.

If the plaintiff has bought sails of the sheriff under an execution, with a knowledge that they are deposited at a sailmaker's, and does not apply for a delivery till after the time when the sheriff is bound to pay over the money, he can maintain no action against the sheriff, if the sail maker refuses to deliver them up.

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The plaintiff was nonsuited, on the ground that he had kept the order in his possession unused, till after the time when the sheriff would be bound to pay over the money, and thereby prevented him, in the event of a refusal to deliver up the sails, on account of a lien, from discharging that lien, and reimbursing himself out of the funds in his hands.

*Marryatt and Wilde*, for the plaintiff.

*Scarlett and Holt*, for the defendant.

[Attornies, ———]

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In Easter Term *Marryatt* moved for a new trial, contending, that if a man sends for articles sold, as soon as he has occasion for them, it is all that is required by law.

ABBOTT, C. J.—I thought, at the trial, that if you had gone to the sail-maker, directly after you received the order, and found that he had a lien, you might have maintained your action against the sheriff; but as you waited from August till the May following, during the interval between which months the sheriff would be bound to pay over the money, you cannot recover. You must be considered as having accepted the order in substitution for the goods.

The other Judges expressed themselves of the same opinion.

Rule refused.

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LANG v. ANDERDON.

March 4th.

**THIS** was an action on a policy of insurance *on a ship or ships*, from Demerara to England. The only question in the case was, whether a ship called the Iris, had complied with the warranty in the policy, "to sail *from* Demerara on or before the 1st of August."

Policy of insurance on "ship or ships" warranted to sail from Demerara on or before the 1st of August. The ship (a small one) sailed on that day 2½ miles, and then anchored at a place nearer the town than large ships can come. This is a "sailing from Demerara" within the policy.

The only witness called, was the captain, who proved, that in the month of July the Iris was at Demerara, taking in her lading for England, and was lying even with the town, about half a mile above the fort, which is at the point of the land; that she completed her lading on the 28th of July, and finally cleared out on the 31st, and was then quite ready for sea; that she weighed anchor on the 1st of August, about one in the day, and came out of the river and proceeded to a distance of about two miles and a half from the place where she took in her cargo; that the wind was adverse but light; that she then came to an anchor by desire of the pilot, who said she would be in a better birth there, for getting underweigh with the next tide; that about ten miles farther on, there is a shoal or bar, after getting over which, the pilot usually leaves; that on the 2nd of August she proceeded on her voyage direct for England; that she had no communication with the shore after her first weighing anchor, except that a boat brought some letters off, with which he (the captain) had nothing to do. The witness further said, that his instructions were to sail before the 12th of August, and he knew nothing of any policy.

On his cross-examination it came out, that ships of a large size load outside the shoal, or bar, but such as are of the size of the vessel in question, load about the place where that vessel did.

For the plaintiff, it was contended, that the words of

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the policy being, "warranted to sail," what had been done was a compliance with the warranty. If it had been to depart the case might have been different. The case of *Moir v. the Royal Exchange Assurance Company*, 6 Taunt. 241, was cited, and it was argued, that if a vessel is in port, and begins to weigh anchor, it is a sailing; and if the ship in question had not quitted the port, the plaintiff would have been entitled to recover; *a fortiori*, was he entitled, she having proceeded so far out.

*Scarlett*, for the defendant.—The case cited is in the defendant's favour. It discovers the principle on which the warranty is given. I agree that there is a difference between a warranty to sail and a warranty to depart. But in all the cases referred to by the learned Judge in the case cited, the warranty was, "to sail," and not as in this case, to sail from. A man may commence his voyage without leaving the port. If he *bona fide* begins to move, and by perils of the sea is obliged to stop, this will be a compliance with a warranty to sail. But, "to sail from," is equivalent to "to depart:" to depart, is to go from; and to sail from, is to go from; and to sail generally, is to begin the voyage. To depart, according to the later cases, is to leave the place. The word from, is exclusive; sailing may be in a port or harbour. It appears, on the evidence, that ships at Demerara lie indiscriminately, a certain distance up the river, and a certain distance below it. But some large vessels take in part of their cargo within the bar, and then go outside it, and in both situations communicate with the Custom-House. Now, supposing this vessel had been one of the large ones, and had not finally left till the 2nd, would it have been a sailing from Demerara? That part where the *Iris* lay, is the roadstead, and there was no departure, because she might have loaded afterwards. It must be taken, that the meaning of the underwriter is

a departure from the limits. How does he know whether the vessel is large or small? There is nothing within the four corners of this policy, to say, that if this is a small vessel it means one thing, and if it is a large one it means another; and therefore it must be taken to mean a sailing from all the places where vessels are accustomed to take in their lading. Demerara does not mean the town. In mercantile transactions, these warranties should have a construction not varying according to the size of the vessel. I contend, that Demerara means all those places where vessels load, and therefore there must be a sailing from such places. Would not a policy "at Demerara" attach to a vessel lying outside the bar, to take in her lading?

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ABBOTT, C. J.—The single question in this case is, whether within the meaning of the policy, the vessel in question sailed from Demerara on the 1st of August. The construction of these instruments must be referred to the usage of trade. If it had rested on the examination in chief of the captain, I should have been clearly of opinion that she had brought herself within the policy. But on the cross-examination, a material fact came out, which raises a doubt upon the subject. We learn from it, that vessels of a large size are obliged to go down below the shoal, or bar, in order to take in their cargo. I quite agree with the learned counsel for the defendant, that a policy at, and from Demerara, would attach to a vessel lying there for that purpose. But I do not know that that is decisive. The words may be understood, with reference to the subject matter of the instrument. It is true, also, that if this vessel had been a large one, it could not have been considered as having sailed. There must be a sailing on the voyage, and that cannot be said to take place while any thing remains to be done. In the present instance, every thing had been done, but the vessel had not got so far as the place where one of

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larger size would be. There is, however, some difficulty in putting two different constructions on one instrument. This policy is "on a ship or ships," and we might be called on to say, on the same policy, that what was a sailing in the case of one ship, was not so in the case of another. If we understand sailing from a place, to mean commencing the voyage, having every thing done, and waiting only for wind and tide, then I think this is a compliance with the warranty, and the plaintiff is entitled to a verdict. But if, on the other hand, we are to take that the warranty must be, to sail from the place where every vessel, whatever her size, may lawfully lie, then the verdict should be for the defendant.

The Jury, which was special, then found their

Verdict for the plaintiff.

The *Attorney General*, *Gurney*, and *Kaye*, for the plaintiff.

Scarlett and *Campbell*, for the defendant.

[Attornies—*Freshfield & K.* and *Reardon & D.*]

In Easter Term, *Scarlett* obtained a rule nisi for a new trial.

March 6th.

CUXON and Others, Assignees of SWEET, v. CHADLEY.

Whether the assignees of a party who has become bankrupt can recover a debt due from the defendant, if the bankrupt, before his bankruptcy, agreed to set it against a debt that he owed the defendant's brother, such arrangement not being in writing—*Quære*.

THIS was an action by the assignees of Sweet, a bankrupt, to recover from the defendant James Chadley, the price of some goods sold to him by the bankrupt.

Whether the assignees of a party who has become bankrupt can recover a debt due from the defendant, if the bankrupt, before his bankruptcy, agreed to set it against a debt that he owed the defendant's brother, such arrangement not being in writing—*Quære*.

For the defendant it was proved, that Robert Chadley, his brother, who was also a bankrupt, had had dealings with Sweet; that Sweet owed him money, and that an application was made by him to Sweet, to carry James's debt to his account, to which Sweet assented, and by his desire made an entry in a book some months before the bankruptcy of either party, in these terms: "Your brother's account for frames, glasses, &c. £14." Robert told his brother of it about a fortnight afterwards, and gave him credit for the amount. Robert owed James money.

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and Others,
Assignees of
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Gurney, for the defendant, submitted that the bankrupt having agreed to take Robert instead of James, the assignees could not now recover against James.

Marryatt, for the plaintiff, observed, that there should have been an undertaking in writing.

ABBOTT, C. J.—I rather think it is so. It seems not a discharge of James. The verdict must be for the plaintiffs, with leave to Mr. *Gurney* to move to enter a verdict for the defendant.

Verdict for the plaintiffs.

Marryatt, for the plaintiffs.

Gurney and *Holt*, for the defendant.

[Attornies—*Wade & Hodgson*.]

In Easter term, *Gurney* moved, pursuant to the leave given at the trial, and obtained a rule *nisi*.

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Adjourned Sitzings at Guildhall.

BEFORE LORD CHIEF JUSTICE ABBOTT.

April 12th.

PARK and Others v. PROSSER.

A creditor has a right to call on his debtor for his money at the debtor's lodgings, or other place where he knows him to be, though it is not his place of business, and a denial to a creditor there is as much an act of bankruptcy as if it were his place of business.

THIS was an action by the assignees of Miller, a bankrupt, to recover some money paid by him to the defendant, after he had committed an act of bankruptcy; and the only question was as to the validity of the act of bankruptcy relied on.

It appeared that the money in question was paid on the 15th of March, 1822. A sheriff's officer proved, that he arrested Miller on the 16th of March; and a widow lady, named Smith, with whom he lodged, at Pentonville, proved, that a creditor of the name of Manton came several times in the course of the fortnight preceding the arrest, and that, in one instance, Miller saw Manton at a distance, coming to the house, and said to the witness, he is coming, and I am not in the way, and the servant denied him in consequence, in her hearing. This was before eleven in the morning. The witness further stated, that on several occasions Miller had said, "If any person calls for me, I am not at home." On cross-examination she proved, that the bankrupt was in the habit of leaving her house in the morning, and going to the George and Vulture, in Coruhill, where he had a room for the purposes of his business.

The clerk of Manton, the creditor, proved, that he went three times to Miller's lodgings, to demand the money due to his master, and saw him there on two of the occasions. On his cross-examination he admitted, that once


when he called he was told to go to the George and Vulture, where he went in consequence, and saw Miller, who did not then make any complaints of his calling at Pentonville, on account of its not being his place of business.

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Gurney, for the defence, then called the landlord of the George and Vulture, who proved, that Miller took a bed-room and sitting-room there, which he kept till he was arrested; that people called on him continually, whom the witness knew to be merchants, and that Miller never gave directions that he should be denied to any one; but all saw him if he was at home.

Manton, the creditor, was also called, and proved, that in December, 1821, and afterwards, he called on Miller several times at the George and Vulture, and knew it to be his place of business, and he never had any difficulty in gaining access to him there; that in the beginning of the year 1822, he discovered that he slept at Mrs. Smith's, at Pentonville; and, when going into the city, he sometimes called on him there; but Miller made an objection to his doing so, on account of Mrs. Smith's character, which, he said, might suffer if he were known to reside with her. This was in February, and Miller said Mrs. Smith's house was his private lodging, and his place of business was the George and Vulture, and he was always to be found there. The witness further stated, that he never pressed Miller for money, and had not been alarmed before he heard of the arrest; but would have given him credit for £10,000's worth of guns.

ABBOTT, C. J.—We may take it in this case, that Miller wished persons not to call on business at Pentonville, but at the George and Vulture, but I conceive that a creditor has a right to call on his debtor any where. Besides, if it had been his object, as is suggested, to have it thought that he did not lodge with Mrs. Smith, the answer to those

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who called would have been not that he was not at home, but that he did not live there. I think also, that Mr. Manton's sentiments about the solvency of Miller are better to be gathered from his acts at the time, from the circumstance of his so frequently calling upon him, than from any opinion he may feel inclined to deliver now upon the trial.

The jury requested that Mr. Manton might be asked whether he had any collateral security for his debt? and receiving an answer in the negative, and in addition, that he had not been promised any, brought in their verdict for the plaintiff, establishing the act of bankruptcy.

Scarlett and Campbell, for the plaintiff.

Gurney, for the defendant.

[Attorneys—*Kearsey & S. and Oakley.*]

April 12th.

SCHLENKER v. MOXEY and Another.

If A. has lent money on a deed of assignment, which is deposited in his hands, he is not compellable to produce it on the part of the assignor, in an action between the assignor and a third person.

IN this case, among other matters, it was necessary, on the part of the defendants, to obtain the production of a deed of assignment from them to a man named Wade. A witness was called, who acknowledged that he had it in his possession, that it was left with him by Wade as a security for money he had lent him, and he thought his interest might be affected by the production of it.

Scarlett, for the defendant, submitted that the witness ought to be compelled to produce it.

ABBOTT, C. J.—I cannot make a gentleman produce

his deed. He says, it may affect his interest; I cannot say it may not; it may appear to want a stamp, or to have some other defect.

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Scarlett.—If Wade had required him to produce, then the case might have been different; he may have a right to withhold it as against Wade.

ABBOTT, C. J.—I do not know that he has not a right to withhold it against all the world. Moxey might have taken a counterpart. If he produces it, it may turn out to be an invalid security.

Scarlett.—It is merely a deposit.

ABBOTT, C. J.—Then he may lose the value of his deposit. It must be a very strong case indeed to induce me to call upon a man to produce his deed. Besides, the difficulty may always be guarded against.

The facts in the cause were afterwards turned into a special case, and it was agreed to make it part of the case, whether his lordship was right in refusing to make the witness produce the deed (a).

Marryatt and Curwood, for the plaintiff.

Scarlett, for the defendants.

[Attornies—*Willie & M.* and *Argill.*]

(a) If a person receives a *sub-pena duces tecum* to produce a deed, &c. he ought to take it with him to the trial, and if he dislikes to produce it, he ought to make his objection, and the judge will decide whether he must produce it or not.

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CURTIS v. HUNT and Others.

In answer to a plea of *plene administravit*, proof that the deceased's property was sworn under a certain sum is *prima facie* evidence of assets to the amount of the smallest sum, that would pay the same probate duty as the sum sworn to.

THIS was an action of covenant by the plaintiff, as representative of a lessor, against the defendants, as executors of his lessee, for not repairing. There was a plea of *plene administravit*, which the plaintiff denied. The probate of the lessee's will was produced, dated 27th May, 1796, and his property was sworn under 5000*l.* On a reference to the stamp act of that time, it appeared that the next lowest sum was 2000*l.*, *i. e.* that the probate duty appeared to have been paid for a sum between 2000*l.* and 5000*l.* This, it was contended, was evidence of assets to the amount of the smaller sum. It appeared that the premises in question were bequeathed by the will, and the legatee had been let into possession.

Gurney, for the defendants. At this distance of time the plaintiff should give evidence to charge us with the possession of assets. It is twenty-eight years ago. In ordinary cases the statute of limitations has effect after six years, and surely twenty-eight is much too long for the case of executors.

ABBOTT, C. J.—The executors might have taken an indemnity from the legatee. Here is *prima facie* evidence of assets to the amount of 2000*l.* in the duty paid upon the probate. The executors also might have kept the premises to answer the expenses of repairs. It is unfortunate for the executors; but the lessor must not suffer, because they neglected to do what they might have done.

Verdict for the plaintiff.

F. Pollock, for the plaintiff.

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Gurney and Comyn, for the defendants.[Attornies—*Wadson and Potts*.]

HORDERN and Another v. DALTON.

April 13th.

THE plaintiffs were bankers at Dudley, in Worcestershire, and the defendant was the post-master there. In the year 1815, a clerk of the plaintiffs' named Leadbeter, made an agreement with a Miss Driver, who conducted the business of the post-office, for the plaintiff to pay 10s. 6d. a-year, in consideration of which a box was to be provided for the plaintiff's letters to be kept in till they were sent for. On the morning of the 9th of February, 1822, a letter was brought to Leadbeter, by the letter-carrier of Dudley, who said he was desired to say, that he was sorry it had not been delivered before. Leadbeter opened it in his presence, and found a returned bill and note, which ought to have been delivered on the 7th, and of which, in consequence of the delay, the plaintiffs alleged that they could not procure payment, not having time to give notice of the dishonour to the parties.— They therefore brought this action to recover the amount from the defendant. The plaintiffs had regularly sent for their letters, both on the 7th and 8th. There were many such boxes, or pigeon-holes, in the office, and the letter in question was put by mistake into the one immediately adjoining that of the plaintiffs'.

If a post-master has agreed to deliver letters in a particular mode, and by mistake does not deliver one for two days, that letter containing a returned bill, he is not liable in damages for the amount of the bill, if the plaintiff could give notice of dishonour in time, if he sent a special messenger, though too late to do so by post.

It came out, in the progress of the defendant's case, that the parties to the bill and note all lived within a moderate distance of Dudley, and that although the post could not reach them in time, yet, if special messengers

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and Another
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had been sent off, the notices of dishonour would have been sufficient.

ABBOTT, C. J. in consequence of something which fell from the jury, observed to *Taunton*, who was counsel for the plaintiffs, that the jury seemed to be of opinion, that a special messenger ought to have been sent.

Taunton.—The law does not require that trouble.

ABBOTT, C. J.—If you charge any body with a loss arising from mistake, you should shew that no due diligence could have been used by you, which might have prevented that loss.

Taunton.—All that I can say then is, that due diligence must mean all that the law requires.

His lordship then directed the plaintiffs to be called, at the same time observing, there was another great point behind, viz. whether this 10s. 6d. was any thing more than a Christmas-box to the post-master, for these pigeon-holes. He thought, if the 10s. 6d. was to be considered as making the post-master liable, it would cause commercial men to lose the benefit of such an arrangement; for no post-master could stand it.

Nonsuit.

Taunton, Tindal, and E. Lawes, for the plaintiffs.

The *Attorney General* and *Gurney*, for the defendant.

[Attornies—*Whitaker* and *Parker*.]

DE LAMA v. HALDIMAND.

April 14th.

THIS was an action for work and labour. The plaintiff was the Spanish consul, and the defendant the agent of Messrs. Ardouin, Hubbard, & Co. who were contractors with the Spanish Government.

If a consul is acting between party and party, though he acts as consul, he may receive fees; but if he acts for his Government he is not entitled to any.

The only witness called was the defendant's clerk, who proved that, in consequence of an article in the treaty between the Spanish Government and the contractors, which provided that the latter might effect the delivery of certain bonds into the hands of the Spanish consuls at Paris, Amsterdam, and London, whose receipts for the same should be acknowledged at Madrid; the defendant applied to the plaintiff to sign such receipts as the Spanish consul at London. He did sign them. The business was done at different times, and there were several conversations between the plaintiff and defendant; in one of which the defendant told the plaintiff, that if he was entitled to any fees, no difficulty would be made about paying them. The witness also stated that he himself requested the plaintiff several times to state what fees he meant to claim, and he would not.

On the cross-examination he said, that the plaintiff produced to him the instructions of his Government, desiring him to do the business in question, and that it was not till he had obtained those instructions that he would consent to act at all.

ABBOTT, C. J.—I think the plaintiff must be called.

The *Attorney General*.—It is true that he will not act when applied to without the authority of his Government, but he does the business for the defendants.

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ABBOTT, C. J.—I am of opinion, upon this evidence, that he is acting in this business as the officer of his own Government.

The Attorney General.—There are many cases where he acts as consul, and yet receives fees.

ABBOTT, C. J.—Where he acts between one individual and another, though he acts as consul, yet he may receive fees, but not where he acts for his Government. As well might the officers of the treasury here demand fees in the case of exchequer bills. The question is, for whom is the plaintiff acting? I am of opinion he is acting for his Government.

The Attorney General.—It is proved that the defendant said “If you are entitled to fees we will pay them.”

ABBOTT, C. J.—I am of opinion that he is not entitled.

The plaintiff was then nonsuited.

The Attorney General, Marryatt, and Platt, for the plaintiff.

Scarlett and Gurney, for the defendant.

[Attornies—*Martindale and Freshfield & Co.*]

April 14th.

GRAY and Another v. Cox and Others.

If a commodity having a fixed value, is sold for a particular purpose, and it turns out unfit, an action lies though there has been no warranty.

THIS was an action on the case by the plaintiffs, who were ship owners, to recover from the defendants, who were copper merchants, a compensation for the loss sus-

ained in consequence of the defendants having sold them some copper for the sheathing of a West India vessel, which, after a voyage to Demerara and back, turned out to be unfit for use.

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It appeared from the evidence of the plaintiffs' witnesses, that the price paid for the copper in question was the usual price of that which is sold to be put on West India vessels. That at the time it was put on it had no appearance of defective copper, but after the return of the vessel from her first voyage to Demerara (during which she had not met with any accident,) the copper was found to be in a very bad state; that good copper usually lasts 5 or 6 years, but this was worn so much into holes, that the vessel could not safely undertake a second voyage without repair; and that the plaintiffs, in consequence, had her re-coppered.

Gurney for the defendants. The plaintiffs ought to be nonsuited. This action is brought on an implied warranty. It is not proved that there was any express warranty. This is not an action brought in deceit, but it is the case of sheets of copper furnished on an order, and used by the plaintiffs themselves; they had, therefore, better means of knowing its nature than the defendants. When it was put on, it appeared to be perfectly good; but the witnesses say, that a larger portion than usual was afterwards found to be defective. The law implies no such warranty as must be established to support this action. If the quality of an article be known to one of two parties and not to the other, then, indeed, the rule of *caveat emptor* does not apply, but the contrary is the case where it might be known to both. The doctrine of a sound price implying a sound horse, has long been exploded. The defendants are not manufacturers, but merely merchants. He then cited the case of *Parkinson & Lee*, 2 East, 314, and afterwards continued—What is it we have sold? Sheets of copper. It is not pretended that they

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were not sheets of copper. No defects were discoverable by the shipwrights when they put it on, much less could the merchants discover any. It appears, that some sheets of copper, after one voyage, have been sometimes found to be corroded, and here it becomes merely a question of quantity. This is the case of a latent defect, known to neither party; and I submit, that, under the circumstances, the plaintiff cannot possibly recover.

Campbell, on the same side.—The general rule of *caveat emptor*, is so well established, that, it is incumbent on the plaintiff to shew an exception. There was a case decided in the Common Pleas, in which it was held, that if a person buys goods which are to be sent abroad, and which he has no means of previously inspecting, then there is an implied warranty that those goods are marketable. But the case here is very different. How can this case be distinguished from that of a person going into a shop and buying a pair of gloves, or a hat? or of a person buying a horse? Now, with respect to the quantity, if one sheet would not maintain the action, neither will a large number. Here is no express promise, and if there is any at all, it must be an implied one. It seems, there were a great number of defective sheets. The bill of parcels is, in this case, the only evidence of a contract, and that shews merely, that copper was sold.

ABBOTT, C. J.—I think, at present, it is not a case for a nonsuit. My direction to the jury will be, on the case as it now stands, (if Mr. Gurney can alter it by evidence he will), that where a commodity having a fixed price or value, which distinguishes this from the case of the sale of a horse, which has no fixed value, where, I say, such commodity is sold for a particular purpose, it must be understood, that it is to be reasonably fit and proper for that purpose, and when I say reasonably fit and proper, I mean, that a few defective sheets will not shew that it is not fit and proper.

Gurney then called the defendant's clerk, who proved, that they purchased the copper of the Mines Royal Copper Company; that they never had any complaint of their copper before; that the profit was but small, and the delivery within three days after the receipt.

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Scarlett, for the plaintiff, in reply. If the defendants stated to the Mines Royal Company, what the copper was for, they may have their remedy over against them. In reply to the argument about the warranty of horses, he contended, that if a horse is sold for a carriage, and it turns out to be a cavalry horse, and never to have been in a carriage at all, there is no need of a special warranty to enable the buyer to recover.

ABBOTT, C. J.—The question is, whether this copper, so sold by the defendants to the plaintiffs, was fit and proper, or, in the language of the declaration, serviceable copper, for unless it was so, the plaintiffs are entitled to a verdict. Though the defects could not be discovered on the first inspection, yet they must have proceeded from something wrong in the manufacture, and the merchant may have his remedy against the manufacturer.

Verdict for the plaintiffs.

Scarlett and *J. L. Adolphus*, for the plaintiffs.

Gurney and *Campbell*, for the defendants.

[Attornies—*Evit* and *Swaine*.]

In Easter Term *Gurney* obtained a rule nisi for a new trial.

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April 14th

DRABBLE v. DONNER.

If a defendant is served with a notice to produce letters four days before the trial, this is sufficient, though it is objected that he is a foreigner, and has only been in England since the time when the letters were received by him, and therefore he might have left them abroad.

TROVER.

The defendant, in this case, was a foreigner, who came over to England, in August, 1823, and a notice to produce certain letters, was served on the 10th of April, 1824, the cause being tried on the 14th.

Scarlett submitted, that this was not sufficient, unless the plaintiff could shew that these letters were in England with the defendant, when he came over in August, 1823.

The *Attorney General* contended, that it was quite sufficient, as the defendant had been living with his family in England from that time.

ABBOTT, C. J.—I think I must consider this as sufficient. If the contrary were holden, it would give rise to very great delay. A plaintiff might, in some cases, have to wait while a voyage was performed to the East Indies and back.

Scarlett.—I admit the propriety of such a rule, where the party is domiciled in England, and goes abroad for a time.

ABBOTT, C. J.—I never knew this objection urged before.

The shipper of the goods was also allowed to prove the value, by stating the amount of duty which he paid upon them.

The case was afterwards referred.

The *Attorney General* and *Comyn*, for the plaintiff.

Scarlett and *F. Pollock*, for the defendant.

[Attornies, *Williams* and *Wadeson*.]

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MORRIS and Another v. PATON.

April 15th.

THIS was an action by the plaintiffs, who were the proprietors of the Haymarket Theatre, against the defendant, the father of Miss Paton, the actress, to recover damages for the breach of the following agreement.

July 29th, 1822.

"*I hereby agree*, on behalf of my daughter, M. A. Paton, that she shall perform, during the remainder of this season, at 8*l.* a week, and *I also consent*, that she shall enter into articles with Mr. Morris, if he requires it, to perform for the three following seasons, &c. &c." Signed by the defendant.

If a defendant has signed a paper, in which he says, "I agree that my daughter shall perform, &c. this season, and I consent that she shall enter into articles for 3 following seasons," an action lies on the first part for the bare non-performance, but the latter part is a mere consent, and not an agreement.

For the plaintiff, it was proved, that Miss Paton performed during the remainder of the season of 1822, and also till the beginning of September, 1823, when she refused to perform any longer; and the house, in consequence, sustained a serious loss. It appeared, also, that the defendant once made an appointment to sign the articles, but did not keep it.

Scarlett, for the defendant, submitted that the plaintiff must be nonsuited, he not having shewn that the daughter was willing to have signed. If this action were successful, a man who consented that his daughter should marry, would be liable to an action if she would not.

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Gurney, for the plaintiff, contended, that the words "I consent," were equivalent to "I agree."

ABBOTT, C. J.—I am most clearly of opinion, that it is not a contract on the part of the defendant, that his daughter shall sign, but merely expresses his consent; and if she refuses, there is no remedy against him. He has bound himself, with respect to the first part, the performance in 1822, but not with respect to the signing of the articles.

Nonsuit.

Gurney and *F. Pollock*, for the plaintiffs.

Scarlett, for the defendant.

[Attornies—*Williams* and *Chuter*.]

April 20th.

GREENWAY and Another v. FISHER and Others.

A factor having pledged goods to several persons, the factor is a competent witness in an action of trover against the parties having the goods. A packer having, in the exercise of his business, shipped the goods, under the orders of a person who employed him for that purpose, is not guilty of a conversion.

TROVER for calico, which the plaintiffs had entrusted for sale to John and Henry Eccles, who had pledged it with the defendants for money lent.

Henry Eccles was called as a witness on the part of the plaintiffs.

The *Attorney General*, for the defendants, objected—This witness is interested in the event of the cause, for if the plaintiffs recover, he is quit from their demand.

ABBOTT, C. J.—But not from the defendants.

The *Attorney General*.—We are charged with being

all *tort-feasers*, and if so, we cannot call for contribution.

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ABBOTT, C. J.—If you put it in that shape, I shall hold that one *tort-feaser* may be a witness against another.

The *Attorney General*.—This is to discharge him totally against the plaintiffs.

ABBOTT, C. J.—I do not know that. We always have received this kind of evidence.

The witness was allowed to be examined.

It appeared, that one of the defendants, named Woodward, was a packer, who merely shipped the goods, and though he made affidavit at the Custom House, that he was the real owner, yet it appeared 'that it was the common practice for packers to do so, they considering themselves to have a special property in the goods at the time of shipment.

On his part, therefore, it was submitted, that he was not liable in an action of trover, inasmuch as he only acted in the regular discharge of his duty; and the work being done according to directions, no wrong in the transaction between other parties would affect him. If it were not so, every porter, and every carrier, would be liable, as well as a packer.

For the plaintiff, it was replied—All persons who are parties to the conversion are liable. It is so in trespass. The question is, whether Woodward is, or is not, by law, a party to the conversion. If the goods still remain the property of the plaintiffs, the packer is liable. It is clear, that if a pipe of wine were obtained by a person and

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bottled off by his servant, and sent out, *trover* would lie against both. The case of *Stephens v. Elwall*, 4 M. & S. 259, was cited (a).

ABBOTT, C. J.—On the part of Woodward, reliance is placed, and I think properly, on the circumstance of his acting in the ordinary course of his business, and I am of opinion that the course of trade in this instance furnishes an exception to the general rule. The distinction between this case and that of a servant is, that here there is a public employment; and as to a carrier, if, while he has the goods, there be a demand and refusal, *trover* will lie; but while he is a mere conduit pipe in the ordinary course of trade, I think he is not liable.

The fact of a pledge to the other defendants was made out to the satisfaction of the jury.

Verdict for the plaintiffs against all except Woodward.

Scarlett, Brougham, and Chitty, for the plaintiffs.

The *Attorney General, Marryatt, E. Lawes, and Wilds*, for the defendants.

[Attornies—*Hurd & J. and Bolton.*]

(a) This case decides that a servant acting under the order of his master, in detaining another's goods, is guilty of a conversion as well as his master.

SUTTON, Bart. v. The BANK OF ENGLAND.

April 21st.

THIS was an action on the case, to recover the amount of a loss sustained by the plaintiff, in consequence of unreasonable delay in the passing of a power of attorney, for the transfer of stock at the Bank.

The case on the part of the plaintiff was as follows:—

If the Bank of England make unreasonable delay in the passing of a power of attorney to transfer stock, an action lies against them.

The plaintiff having occasion to transfer some stock for the purchase of an estate in Norfolk, which he was to pay for on the 22nd of October, executed a power of attorney to Mr. M'Dougall, his solicitor, for £62,000, which was lodged on the 20th at the proper office in the Bank. The custom of the Bank being to keep powers of attorney for 24 hours only, on the 21st, about 12 o'clock, the broker who lodged it went to obtain it again, and was informed it was not ready. He went afterwards several times before half-past 2 o'clock, and was told it was under consideration in the director's parlour. Soon after 1 o'clock on the same day M'Dougall also went to the Bank, and saw the chief accountant, Dawes, and told him he was very anxious to get the money, on account of his being obliged to leave town according to a previous engagement, to complete the purchase of the estate, and required to know what was the cause of the delay. Dawes said he was not at liberty to state the reason why the power had not passed. M'Dougall then went away and returned a little before 3 o'clock, that being the latest hour at which a transfer could be made, and again demanded to know why the power was not passed. Dawes then said that the directors were not satisfied with the genuineness of the signature of Sir R. Sutton, on account of a difference between it and the signature to a former power. M'Dougall said, if the directors had called him before them he could have explained any apparent difficulty, by producing abundance

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of Sir R. Sutton's letters and cheques on his London bankers, and would have referred to the bankers themselves. Dawes said he was sorry for it, but he could do nothing more, as the power was under consideration. M'Dougall then asked if it would be any satisfaction to the directors to see him, and Dawes replied that he did not think it would be of any use. M'Dougall went that evening into the country. The broker called every day between 12 and 1, and it was not till the 25th that he was informed that the power was passed; a letter having been written to Sir R. Sutton, who acknowledged the authenticity of the signature. M'Dougall was an attorney of 40 years standing, and was well known to the Bank solicitor, and had transferred stock under a former power from the plaintiff to the amount of £200,000. One of the witnesses also to the power in question, was a witness to the former power.

On the part of the defendants it was proved, that it was the practice of the Bank, that when a power was in amount under £20,000, it merely underwent the inspection of the head of the power of attorney office; but when it was of that amount or upwards, it was submitted in addition to the chief accountant, and afterwards to the directors. That it was the general practice in cases of doubt, to write to the party executing the power, and that in this case the plan of writing was adopted as the speediest course. That the power was passed on the 24th, and the stock might have been transferred on that day.

It appeared that M'Dougall was not in town on the 25th, when the broker knew of the passing of the power, and did not receive intimation of it till the 27th. The transfer was not made till the 29th; but there was no difference in the price of stock between the 27th and 29th.

The *Attorney General* for the defendants, contended

that they were entitled to a verdict. Though the custom had been in ordinary cases to keep the power only 24 hours, yet where there had been any doubt, a longer time had always been taken. Great deliberation was requisite. The ordinary course, where the sum is large, is to apply to the party or the witnesses, and in this case the witnesses lived in the country as well as the principal. Similar cases had occurred many times before, and no notice had been taken of the delay, and no such claim as the present was ever thought of being urged.

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Scarlett for the plaintiff, in reply.—The doubt should have been followed by an immediate inquiry of the party presenting the power. The directors should have sent for Mr Dougall into their parlour. They have not only taken unreasonable time, but refused to adopt the most reasonable course. The broker says he called every day, and was not informed of the passing of the power till the 8th. The defendants say it was passed on the 24th. If the broker called on that day before the power passed, when it had passed they ought to have sent to him. A person is not bound to wait day after day, and hour after hour, neglecting his business, while the Bank are taking steps which are for their own security.

Abbott, C. J.—The question is, whether there was an unreasonable delay in permitting Mr Dougall, the attorney named in the power, to transfer the stock. As regards this question, the Bank of England, notwithstanding their high character, stand in no other situation than that of a private banker. If they suffer a transfer to take place under an invalid power, they must answer to the individual; therefore they should have proper time allowed them to ascertain its authenticity. The question is not so much whether, when a reasonable doubt arises, which cannot be cleared up in town, the Bank should be allowed to write into the country; but the question upon

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this evidence is, whether there was reasonable ground of doubt, and if so, did they take reasonable means to have that doubt cleared up? M'Dougall, it seems, went to Dawes, who is the chief accountant. Dawes refused to acquaint him with the difficulty. M'Dougall remonstrated, as was natural for a person so circumstanced; but Dawes still refused to tell him the nature of the objection. Now the question is, was it a fit and reasonable thing to withhold from M'Dougall this information, at a time when the difficulty might have been cleared up; and in deciding this, it will be proper to consider who M'Dougall is, for it is a very different thing, whether you are treating with a stranger or a person in a known character. It appears that he is an attorney of 40 years standing; that he had acted under a former power, and was well known to the Bank solicitor. It is also a singular circumstance, that one of the witnesses to the power in question was also a witness to a former power, and therefore they had the opportunity of making a double comparison of signatures. If there was either no ground of doubt, or if there was, and the Bank did not take reasonable methods of getting it cleared up, the verdict should be for the plaintiff. And then will come the question as to the *quantum* of loss. It appears that M'Dougall told Dawes, that he was obliged to go into Norfolk, and that he did go, and did not return in time to receive the broker's note, which was written on the 25th. The Bank say the power was passed on the 24th. The broker says he inquired every day, and was not informed of it till the 25th. Now it is likely he inquired about half an hour before the passing, and the Bank might have sent their porter to call out his name in the Rotunda, or they might have written to M'Dougall, with whose residence they were acquainted, but they did not do either. His lordship then left the question to the jury, who returned a verdict for the plaintiff.

Damages, 239*l.* 10*s.* 6*d.*

Scarlett and Adolphus, junr. for the plaintiff.

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The *Attorney General, Gurney, and Bosanquet, Serjt.*
for the defendants.

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[Attornies—*M'Dougall and Freshfield.*]

FULLER and Others v. SMITH and Another.

April 21st.

THIS was an action to recover the amount of a bill of exchange, which had been discounted by the plaintiffs for the defendants, and which afterwards turned out to be a forgery. The bill purported to be drawn by a person named Lunn, and accepted by George Norman and Son, payable at the plaintiffs', who were their bankers, and indorsed by Lunn and one Robert Simpson.

The forgery was clearly proved.

For the defendants, their clerk was examined; who swore that the defendants were the agents of Simpson, and had paid over the money to him before they had any notice of the forgery: but, on his cross-examination, he admitted that there was a running account between the defendants and Simpson, and entries in the books on both sides. These books were not produced.

If a banker of a supposed acceptor of a forged bill, discount it for the agent of one of the indorsers; on the discovery of the forgery the banker so discounting may recover back the money he paid on the bill, notwithstanding he was the banker of the supposed acceptor, and therefore might be taken to know his handwriting.

The *Attorney-General*, for the defendants.—The defendants in this case are entitled to a verdict. It appears, from the evidence of their witness, that they were only the agents of Simpson, and had paid over the money to him before they had notice of the forgery: and if an agent pays over money to his principal, he cannot be called on

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to refund. In this case, also, it appears that the plaintiffs are the bankers of the acceptors, as well as the discounters of the bill; and bankers are bound to know the handwriting of their customers. If there was any negligence, it was on the part of the plaintiffs.

Scarlett, for the plaintiffs.—I doubt whether Simpson was indebted to the defendants at all, because the books are not produced. But it makes no difference whether the defendants were acting as agents or not: the contract is with them, and there is a warranty on their part. It matters not, whether the subject of the action be a bill of exchange, or any thing else. Suppose a man sold another a hamper, as a hamper of wine, and it turned out to be a hamper of water; he could not, on being called on to return the money, say, “I sold it for a principal;—you must run after him.” There is no defence to the action.

ABBOTT, C. J.—The only question of fact in this case is, whether the defendants paid over the money to Simpson before they had notice of the forgery; but I am of opinion, in point of law, that they are liable, whether they did so or not. With respect to the argument, that the plaintiffs ought to have known the handwriting of the acceptors, I am of opinion, that a banker is bound to know the handwriting of those who draw on him, as far as regards paying bills so drawn, but not when discounting a bill; for his attention is not called to it then. My opinion therefore is, that the plaintiffs in this case are entitled to a verdict. His lordship then requested the jury to say, whether they were satisfied of the fact of the money having been paid over before notice of the forgery; and they stated that they were not satisfied.

Verdict for the plaintiffs.

Scarlett and Goulburn for the plaintiffs.

The *Attorney General* for the defendants.

[Attornies—*Smith and Alliston & H.*]

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See *Smith v. Mercer*, 6 Taunt. 76.

CLARK v. CAPP.

April 22d.

DEBT for a penalty, for acting as a broker in the city of London without being duly licensed.

To prove that the defendant acted as a broker, a witness produced one of the cards of the defendant and his partner—

“Capp & King,
Ship’s Brokers, &c.”

ABBOTT, C. J.—This card cannot be given in evidence, unless it was received from the defendant himself. The proper way is, to give the defendant notice to produce his cards; and then prove one as a copy, or give parol evidence of the contents.

To make a defendant’s card evidence, you must give him notice to produce his cards, and put in one as a copy, unless the one to be put in can be proved to have been given to the witness by the defendant himself.

Nonsuit.

The *Attorney General*, the *Common Serjeant*, *Bollund*, and *Tindal*, for the plaintiff.

Scarlett, for the defendant.

[Attornies—*Newman and Warne.*]

In every case, where any written paper, at all bearing on the case, or the proofs to be adduced in support of it, is in the pos-

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MAC GREGOR v. LOWE.

If several persons are jointly engaged in raising money for a bubble, one cannot maintain an action for money had and received, against another of them, for the money so raised.

ACTION for money had and received. The defendant was employed by the plaintiff to act as agent for the receiving subscriptions for the Poyais loan. Scrip certificates were produced for 30,000*l.*, which had been issued out by the defendant for a deposit of 15 per cent. on a loan of 200,000*l.*; and on these certificates the defendant, it was contended, had received money.

ABBOTT, C. J. (having read one of the certificates, which stated the loan to be for the use of the state of Poyais), said, there must be some evidence given, that at the time of this transaction there existed a state of Poyais; for if all these parties were actors in a bubble to raise money for a non-existent state, I am clearly of opinion

sion of the opposite party, it is always prudent to give him notice to produce it. If the paper is material, the plaintiff will be nonsuited if it be not produced; for unless he has given notice to produce it, he cannot give parol evidence of its contents. Nay, further, if, in assumpsit, a plaintiff has made out a case on a *quantum meruit*, and one of his witnesses, in cross-examination, says that there is a written agreement on the subject, the plaintiff must put in that agreement, or be nonsuited; or if the defendant has it, and the plaintiff's attorney has not given the defendant notice to produce it, the plaintiff must be nonsuited. This, it may be said, is very clear; but it is surprising,

that so many causes are, almost every sittings, lost or compromised on bad terms, merely because parties think they may go on a *quantum meruit*, when there is a written agreement or undertaking, which perhaps they don't wish to go upon. It is also prudent to give a defendant, in actions for goods sold, notice to produce all invoices, bills of parcels, &c. In short, if you give notice to produce too many papers, your counsel may still exercise his discretion whether he will call for their production or not; but if you have not given notice to produce them, you are shut out of the benefit of their contents, and very often nonsuited for want of them.

that one of them cannot maintain an action for money had and received against another.

1824.
MAC GREGOR
v.
LOWE.

A witness proved that a governor and lieutenant-governor of Poyais had been appointed by Sir Gregor Mac Gregor, but that no state of Poyais then existed.

ABBOTT, C. J.—If there was no existing state of Poyais at the time of the loan, this action cannot be maintained.

Nonsuit.

The Common Serjeant and F. Pollock, for the plaintiff.

Scarlett, for the defendant.

[Attornies—*Pasmore* and *Swaine*.]

REX v. TAGGART and BASKCOMB.

April 22d.

THESE defendants were indicted for having corruptly agreed, for 100l., to procure an East India cadetship for Frederick Bennet.

If two defendants are indicted for *jointly* making a corrupt contract with a third person, for the procuring an East India cadetship, one of the defendants may be convicted, tho' the other is acquitted.

The case was very slight against Taggart, but strong against Baskcomb.

Scarlett, for Taggart, went for an acquittal on merits.

Denman, for Baskcomb, contended, that as the contract (though a corrupt one) was charged in the indictment as the *joint* contract of both the defendants, one of them could not be separately convicted.

1824
 REX
 v.
 TAGGART &
 BASKCOMB.

ABBOTT, C. J.—I am of opinion, that if two parties are indicted *jointly* on a *joint* corrupt contract, each may be separately found guilty.

Verdict—Taggart, Not Guilty; Baskcomb, Guilty.

The *Attorney General*, *Bosanquet*, and *Tindal*, for the prosecution.

Scarlett, for Taggart.

The *Common Serjeant*, for Baskcomb.

[Attornies—*Lawford* and *Sabine*.]

Two persons may be indicted for an offence arising from a joint corrupt contract, and each convicted separately, the same as they might if they were jointly indicted for an assault or a robbery: but if you state the corrupt contract to be joint, and it is necessary to prove what the contract

was, and it is proved to be several, the defendants must be acquitted, on the ground of variance. It is best, if there is any doubt about what contract will be proved, to lay it in different ways in different counts.—In the following Trinity Term, Baskcomb was sentenced to pay a fine of 200*l*.

April 23d.

BAIN v. MASON.

Adultery. —
 Convenient
 mode of proving
 the identity
 of the parties to
 the marriage.

THIS was an action for criminal conversation with the plaintiff's wife.

The proof of the marriage of the plaintiff and his wife, was an examined copy of the marriage register of one of the parishes at Liverpool; and the person who examined the copy with the original register, being acquainted with the handwriting of the plaintiff and of his wife, stated

that the signatures to the original registry which he saw at Liverpool, were of the handwriting of the plaintiff and his wife. This was the evidence of identity.

The fact of adultery was proved.

Verdict for the plaintiff.

Scarlett, Brougham, and Bernard, for the plaintiff.

The *Attorney General* and *Wilde*, for the defendant.

[Attornies—*Slater* and *Freeman*.]

1824
BAIN
v.
MASON.

In actions for adultery, it is not only necessary to prove an actual marriage, which is usually done by putting in the register book, or an examined copy, (though it may be done by the evidence of a person who was present at it), but the identity of the parties must be also proved. In the case of *Birt v. Barlow*, 1 Doug. 173, *BULLER*, J. points out a variety of ways of proving identity; such as, the wife being always called by her husband's surname after the date of the marriage; by the evidence of persons who partook of the wedding dinner, &c.; but the mode in the principal case seems to arrive at a more conclusive proof, and is often easier to be effected. In cases of adultery, it is not necessary to prove a licence for the marriage, or a publication of banns. Nor is it at all necessary to call the subscribing witnesses to the entry in the marriage register, whether the register be produced or not. A book of Fleet marriages is not a register that can

be produced in evidence; and it has been held that a copy of a register of a foreign chapel is not evidence of a marriage abroad. *Leader v. Barry*, 1 Esp. Rep. 353. And I apprehend, that the certificate of marriage, that parties receive at Gretna Green, would be no evidence of a marriage. Indeed, a plaintiff would have the greatest difficulty in proving a marriage of that sort. If the marriage took place in a chapel, the plaintiff ought to give some proof that it was a chapel in which marriages may be lawfully celebrated. How far a distinct admission of a marriage by the defendant, dispenses with the proof of it, has never been decided. In the case of *Morris v. Miller*, 4 Burr. 2057, the defendant having said that the lady was "Captain Morris's wife," was considered insufficient; because, as is stated in B. N. P. 28, it was rather an admission that the lady passed as Captain Morris's wife, than that there had been an actual marriage, which was a fact not

1824.

April 23d.

REVENGA v. MACINTOSH.

The defendant had taken the opinion of a special pleader, as to whether the plaintiff was liable for a debt; whose

opinion was favorable to the defendant. The defendant caused the plaintiff to be arrested for it. In action for this arrest, charged to be malicious, the jury found for the plaintiff; and the Court above would not disturb the verdict.

ACTION for a malicious arrest. The plaintiff was the secretary for foreign affairs to the Colombian government, and the defendant an army accoutrement-maker, who had contracted with that government, through their agent, a person named Mendez, for the supply of arms to

likely to be in the defendant's knowledge. In *Trueman's* case, 1 Ea. P. C. 470, the Judges considered that, in an indictment for bigamy, the admission of the prisoner was sufficient evidence of the first marriage. Of course, if a plaintiff can prove an actual marriage, he had better not rest his case on any admission, as it never has yet been done; but I can see no reason why a man may not admit that a person is another's wife, as well as any other fact against himself, and then the only question is, whether what the defendant has said amounts to an admission. Jews and Quakers being excepted out of the marriage acts, proof must be given of their marriages, according to their respective forms of worship; and by the case of *Noel v. Horn*, 1 Camp. 61, it appears, that to prove a Jewish marriage, it is not sufficient to call persons who were present at the ceremony in the synagogue; as that is merely the acknowledgment of a previous written contract, which contract ought to be

proved, as any other contract would be. I am not aware that any dispute has arisen on the proof of a marriage in a private room, in England, under the special licence of the Archbishop of Canterbury; but I take it, that distinct evidence must be given that there was a special licence (that is, that it must be proved in the same way as any other written document), because marriages solemnized in any other place than a church or chapel are void, unless by special licence of the Archbishop; therefore, the marriage being *prima facie* void, it is incumbent on the plaintiff to bring his marriage within the exception. It should be observed, that very few of the cases on marriage, decided before the year 1754, are law now; because, before that time, any verbal contract for a marriage, if in *verba de presenti*, was, it seems, a valid marriage; as was any contract in *verba de futuro*, if followed by cohabitation. In actions for adultery, the defendant may go into proof to shew the marriage invalid.

the amount of 180,000*l.*, for which he received debentures. The plaintiff happened to come to England, and the defendant applied to him to ratify the contract; but he refused, saying, that he had no authority from his government to do so. On the 3d of March, 1822, a letter was written to the plaintiff by the defendant's attorney, stating that, by the law of England, he was liable for the debt of his government, and threatening an arrest. In consequence of this, on the 4th, the plaintiff's attorney applied to the defendant's attorney to see the documents on which the liability of the plaintiff was supposed to arise; but the inspection was refused. The affidavit of debt was for 90,000*l.*, and the bill of Middlesex for 180,000*l.*, indorsed "Bail by affidavit for 90,000*l.* and upwards." The plaintiff was arrested about the 20th of March, and confined in a lock-up house for three or four days, and then removed to the King's Bench prison, where he remained till the 17th of May following, when he was discharged by consent of the defendant's attorney, on bail being put in by two gentlemen, who were not required to justify. Two rules were taken out for time to declare, and then a peremptory rule to declare. The defendant then declared for goods sold and money paid, and very soon after took out a rule to discontinue, and paid the costs, as taxed, in the month of December.

For the defendant it was proved, that the plaintiff corresponded with Mendez, and in some of his letters spoke of "our necessities;" but in others, it appeared that he wrote "by order of the President." It was proved also, that a case was laid before a special pleader by the defendant, as to the personal liability of the plaintiff, which was answered by an opinion in favor of such liability. And it was argued, that under these circumstances, the defendant was fully justified in commencing proceedings; inasmuch as they shewed clearly, that he was not only not actuated by malice, but had also probable cause. The defendant was called on to produce one of the debentures, but refused.

1824
REVENGA
v.
MACINTOSH.

1824.
REVENGA
v.
MACINTOSH.

For the plaintiff it was urged in reply, that the defendant must have been influenced by an indirect motive; and that it appeared from the delay, and subsequent discontinuance, as well as the other circumstances of the case, that his object was, to force the plaintiff to ratify the contract, and that the special pleader's opinion was obtained with that view.

ABBOTT, C. J., in summing up the case to the jury, observed, that if they thought the defendant acted *bona fide* on the opinion of the special pleader, they should find their verdict for him; but that if they thought he merely used the process of the law as a mean of compelling the plaintiff to come into his views, and did not believe at the time that he had really a right of action against him, then they should find their verdict for the plaintiff; and for such damages as they should think right.

The jury found a verdict for the plaintiff—

Damages, 250*l*.

Scarlett and F. Pollock, for the plaintiff.

The *Attorney General*, the *Common Serjeant*, *Bingham*, and *Wilde*, for the defendant.

[Attornies—*Lavis* and *Hornby*.]

On a motion for a new trial, in the following Term, the Court held, that the way in which the question was left to the jury, was correct; and refused to disturb the verdict.

1824.

BARTON and Another v. BODDINGTON, Esq.

April 24th.

TROVER for tallow. This action was brought against the defendant as treasurer to the London Dock Company, under the following circumstances.

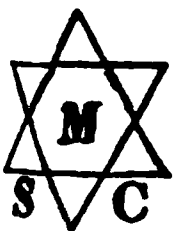
In the beginning of September, 1823, Mr. John Milford imported from St. Petersburg, a quantity of yellow candle tallow, and on the 8th of that month he sold 100 casks of it to Messrs. Cattley & Esdaile, and delivered a transfer order in the following terms —

“ London, 8th Sept. 1823.

“ 22844.

“ To the superintendants of the London Docks,—
 “ Please to deliver, weigh, transfer, or rehouse to Messrs.
 “ Cattleys & Esdaile, the undermentioned goods, & of
 “ the John, Ward, from St. Petersburg.”

Marks



New
 No.

$\frac{1}{100}$
 Sep. 16/23.

One Hundred Casks Tallow.
 J^{no}. Milford.
 A. 188.

In the margin of the order was written, “ charges from
 “ the landing scale to be paid by the buyers.”

On the 9th of September, Messrs. Cattleys & Esdaile sold the 100 casks of tallow to the plaintiffs, upon the same conditions on which they had purchased, and an indorsement was made on the transfer order in favour of the plaintiffs, who paid the purchase money and the charges according to contract; and the tallows were housed in their names at the docks.

On the 29th of September, the plaintiffs sold the tallows in question to Messrs. Moberley & Bell, and the follow-

If the vendor of tallows in the warehouses of the London Dock Company sell such tallows, and give an order addressed to the Company, by which they are directed “ to weigh, deliver, transfer, or rehouse,” the tallows to Messrs. M. & B.; this order being received at the Docks, and M. & B. having sold the tallows, and received the money for them, the original vendor cannot stop them in the hands of the Company, tho’ the tallows have not been weighed. It appearing that a weighing, if the sale takes place (as this did) soon after the importation, is not usually required; the weight on which the custom-house duties were paid in such case, being considered by the parties as correct and sufficient.

1824.

BARTON
 & Another
 v.
BODDINGTON,
 Esq.

ing is a copy of the contract delivered to them by the broker:

“ London, 26th Sept. 1823.

“ Sold for Messrs. W. and I. Barton, to Messrs. Moberley & Bell, 100 casks of St. Petersburg new 4 tent of yellow candle tallow, at 4ls. per cwt., to be paid for in cash with 2½ p^{er} cent. discount, draft 25. 1 cask tares, 12 p^{er} cwt., and 14 days to be allowed for delivery. In case of any dispute about the quantity, to be settled by arbitration.

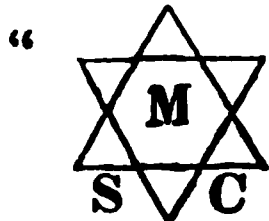
“ Wm. Ware Simpson.

“ Sworn Broker.”

Upon the contract being concluded, the plaintiffs delivered the following transfer order to Messrs. Moberley & Bell —

“ London, Sept. 26th, 1823.

“ To the superintendant of the London Docks.—Please to weigh, deliver, transfer, or rehouse to the order of Messrs. Moberley & Bell, the undermentioned goods, in the ship John, Captain Ward, from St. Petersburg.”



One Hundred Casks Y. C. Tallow.

1 c 100

W. & I. Barton.”

Rec^d. Sept^r. 27/23.

A. 188.

Transfer given

Sept^r. 27/23.

H. W.

In the margin was written, “ charges from the 10th October, to be paid by the buyer.”

This order was delivered at the docks on the 27th of September, and the above receipt marked on it there.

At the expiration of the prompt (14 days,) viz. the 10th October, Messrs. Moberley & Bell gave the plaintiffs a check for £1300, on account of the tallows, which check, upon being presented, was refused payment, on account of its being dated the 12th of October, as was

then supposed, by mistake. On the following day, the plaintiffs got another check for £1350, which was likewise dishonoured, Messrs. Moberley & Bell having on that day suspended their payments.

1824.
BARTON
& Another
v.
BODDINGTON,
Esq.

On the same day that Messrs. Moberley & Bell purchased the tallows of the plaintiffs, they sold them again to Messrs. T. & B. Hawes, and indorsed to them the plaintiffs' transfer order.

It appeared that goods landed at the docks are weighed immediately by the King's officer, and if they are sold at that time, they are invoiced to the buyer on the weights at the landing scale. But tallow being an article that diminishes by keeping, if a sale does not take place immediately, it is of course necessary to weigh it again before the precise quantity can be ascertained, for which the purchaser is bound to pay. But though the phraseology of the transfer orders contains the word "weigh," yet it was proved to be the custom for tallows to be sold on 'Change, and for purchasers to pay a sum as near the proper sum as possible, and to transfer them from hand to hand by means of the transfer orders, and not to require any second weighing till the tallows are taken away from the docks, the reason of which appeared to be, that when they are weighed and not taken away a charge is made for rehousing.

There was no weighing in the present case, except that at the landing scale, till long after the sale to the Messrs. Hawes; but it was proved that Messrs. Hawes bought on 'Change, and actually paid the purchase money; and that the charges for the original weighing, which ought to have been made out to the plaintiffs by the Dock Company, having by mistake been made out to Messrs. Hawes, they paid them in the first instance, and sent the account to the plaintiffs who discharged it; and that upon such account there was an item of 8s. 4d. for a transfer, which according to the usage of trade would be notice to the plaintiffs of the sale to the Messrs. Hawes.

1824

BARTON
& Another
v.
BODDINGTON,
Esq.

On the 15th of October, 1823, at which time the tallows were still in the docks, the plaintiffs' solicitors gave notice to the defendant not to deliver them to the order of Messrs. Hawes. The Dock Company did not comply with this notice, and in consequence the plaintiffs brought their action.

The question was, whether or no it was necessary that there should be an actual weighing, to transfer the goods legally into the possession of the buyer.

The case of *Hawes v. Watson (a)* was cited.

ABBOTT, C. J., after hearing the observations of counsel, in the course of which it was agreed to raise the question by a bill of exceptions; with a view to such a course of proceeding, gave his direction as follows—"On the evidence, I am of opinion, that an actual weighing was not necessary for the delivery; and, although the first seller has not been paid, yet, as the subsequent buyer has *bond fide* paid the person he bought of, the first seller cannot call on the Dock Company to deliver the goods to him. The verdict therefore should be for the defendant."

Verdict for the defendant, subject to a bill of exceptions.

The *Attorney General*, *Tindal*, and *Wilde*, for the plaintiffs.

Scarlett, *Bosanquet*, *Serjt.*, and *Carter*, for the defendant.

[Attornies—*Pearce* and *Teesdale*.]

(a) The case of *Hawes and Others v. Watson and Others*, is not yet in print. I have, however, been favoured with a M. S. note of it. It was an action of trover brought against the defendant, who was a

wharfinger, to recover the value of 100 casks of tallow, which on the 25th of September, 1823, the plaintiffs had purchased of Messrs. Moberley & Bell, at 40s. 4^d cwt. These casks of tallow were in the

1824.

CURTEIS and Another v. WILLES.

April 24th.

ACTION against the sheriff for a false return of *nulla bona* to an execution issued against a man named Crutchley. The defence was, that Crutchley had committed an act of bankruptcy previous to the time when the execution issued.

If a trader absents himself from any place to avoid a creditor, it is an act of bankruptcy.

warehouse of the defendants, on whom Moberley & Bell gave the plaintiffs a transfer order, in form similar to that in the principal case, of the date of September 8. The defendants on receiving this order transferred the tallow into the plaintiffs' name in their books, for which they were paid 8s. 4d. and also delivered 21 casks of it to a person to whom the plaintiffs had sold. On the 15th of October, Moberley & Bell stopped payment, and Raikes & Co., of whom they had bought the tallow, directed the defendants not to deliver it up. At the trial, a verdict was found for the plaintiffs; and in Hilary Term, 1824, the *Attorney General* moved for a new trial, on the ground that it had been decided in the case of *Hansen v. Meyer*, 6 East, 614, that where goods were sold by the hundred weight, the delivery was not complete till after they had been weighed, and therefore the right of stopping them *in transitu* remained with the vendor;—and when pressed by the Court, that the defendants had assented to the delivery order; he contended, that the conduct of the defendants could not take away

the right of Raikes & Co. to stop *in transitu*. The Court were of opinion that this was not a case of stoppage *in transitu*, for that the defendants having transferred the goods into the plaintiffs' name, they held them entirely for the plaintiffs' benefit. In *Withers v. Lys*, Holt, N. P. 18. it was held, that an order by the vendor of goods to a wharfinger, to deliver goods to the vendee, does not pass the property, if any thing (such as weighing) remains to be done. From the cases of *Loring v. Zamuda*, 7 Taunt. 265, and *Lucas v. Dorrien*, 7 Taunt. 278, it seems that the mere indorsement of a West India Dock warrant passes the property; and in the latter it is laid down, that if an order is delivered to a wharfinger, by which the vendor directs him to deliver goods to the vendee, and he assents to it, the property passes, though no transfer has been made in his books. An indorsement of a bill of lading for valuable consideration, and without the indorsee having notice of any thing which would make the bill of lading not fairly assignable, will pass the property of the goods so as to prevent a stoppage *in transitu*.

1894
 CURTEIS
 & Another
 v.
 WILLES.

It appeared that Crutchley lived in Warwickshire, and was in the habit, when he came to town, of calling on a person named Corbet, for the purpose of purchasing goods; that on one occasion before the execution he was at Corbet's house, and said to one of Corbet's clerks, that he owed money to a man named Johnson, who he understood lived in the neighbourhood, and he should not like to see him, because he expected he would bother him for payment. The clerk replied that Johnson was very likely to call there that day; upon which Crutchley said that he would go away directly; but while he was speaking, he saw Johnson coming, and immediately went down into a lower warehouse, where he remained till Johnson was gone. Crutchley was not in the habit of seeing any one on business at Corbet's, but merely went there for the purpose of looking out goods.

For the plaintiff it was contended, that this was not a valid act of bankruptcy; because the absenting ought to be either from the dwelling-house, or from the ordinary place of business, or to avoid a sheriff's officer, or from the keeping of an appointment.

ABBOTT, C. J.—I am of opinion, that a man who absents himself from *any place* to which he knows his creditor is coming, in order to avoid him, and to prevent, as he calls it, his bothering him for money, commits an act of bankruptcy.

Verdict for the defendant.

The *Attorney General* and *Wilde*, for the plaintiffs.

Scarlett, for the defendant.

[Attornies, *Dawes* and *Hertslet*.]

In Easter Term the *Attorney General* moved to set aside the verdict on the grounds he stated at the trial;

and added, that the reason why he contended that a man's absenting himself from a place which was neither his place of residence nor business, could not be an act of bankruptcy, was this, that he was not supposed at such a place to be in possession of money to discharge the debt.

1824
CURTIS
& Another
v.
WILLES.

ABBOTT, C. J. observed, that although he might not have the money about him, yet he might promise to make arrangements. He might say, "I will pay you to-morrow," or something of that sort.

The Court, after citing the case of *Bayley and Scofield*, 1 M. & S. 338, refused the application.

CAMBRIDGE v. ANDERDON.

April 24th.

THIS was an action on a policy of insurance on the ship Commerce, at and from Quebec to Bristol. The plaintiff claimed as for a total loss. The facts of the case were these:

The vessel sailed from Quebec on the 8th of July, 1823; the pilot left at the usual place, about 150 miles off; she proceeded down the river Saint Lawrence, and about half past eight on the morning of the 13th of July, during the continuance of a thick fog, which commenced on the preceding morning, she struck on a ragged shore, about 200 fathoms from the land. The captain tried many ways to get her off, but did not succeed. He landed as soon as he was able, which was about twenty-four hours after she struck, and found they were about 220 miles from Quebec. He had a conference with all his officers, and the general conviction was, that it would

If a ship is so injured by perils of the seas, that she is rendered wholly unfit for sea, and cannot be repaired but at a greater expense than building a new ship, the owner may recover for a total loss, though the ship, in the state she is reduced to, is sold with her registry.

1824.
CAMBRIDGE
v.
ANDERDON.

cost less to build a new ship than to make the one in question sea-worthy. A considerable quantity of timber, forming the chief part of the cargo, saved the ship from going to pieces. The captain went to Quebec, and saw the surveyor for Lloyd's, and agreed with him on the names of three surveyors, who were to inspect the ship. He afterwards, acting on their judgment, sold the ship and cargo. She was sold with her register. The purchasers were shipwrights, who did some repairs to her, and sent her on another voyage, in the prosecution of which she was lost. The captain, the mate, and the ship's carpenter proved that they saw her after the repairs were done, and did not think her fit to undertake a voyage, and that they would not have trusted their lives in her.

For the defendant it was argued, that the plaintiff could not recover as for a total loss; for the ship was not sold as a wreck, to be broken up, but was sold with her register, to make another voyage; and it was clear, from the circumstance of her being purchased by shipwrights, and repaired, that she must have existed as a ship; and if a vessel exists in specie, and can by any repairs be made fit for sailing, it is not a total loss.

ABBOTT, C. J.—The question in this case is, whether this is a total or a partial loss; and, I think, in considering that question, we should look, not so much at the acts of the parties, either buyers or sellers, as at the accounts they give of the state of the ship itself. The circumstance of selling with the register is in general against a total loss; but it is the act of the master, and ought not to be decisive. If on the evidence the jury think that she was utterly useless as a ship, after she struck, and never could be made useful, but at an expense equal to her value; then I am of opinion, in point of law, that it is a total loss, with benefit of salvage, though the form of a ship remained.

The jury found a verdict for the plaintiff as for a total loss.

1824
CANBRIDGE
v.
ANDERDON.


Scarlett, Marryatt, and Platt, for the plaintiff.

The *Attorney General*, *F. Pollock*, and *Holt*, for the defendant.

[Attornies—*Rivington and Reardon & D.*]

In Easter Term the *Attorney General* moved for a new trial, on the ground that an abandonment was necessary; but the Court refused his application, Mr. Justice BAYLEY saying (the rest of the Court concurring), I take the legal principle to be, that if by any perils within the policy the ship ceases to retain the character of a ship, the party may sell her, and recover as for a total loss, without any abandonment. This appears from the case of *Idle v. the Royal Exchange Assurance Company*, 3 J. B. Moore, 115. But as it seems a writ of error was brought in that case, and we do not exactly know what was the final result, I do not much rely upon it. There is, however, another case in 6 J. B. Moore (a), in which it was held, that if a sale be justifiable, the assured may recover as for a total loss. And though Mr. Justice RICHARDSON is said to have differed from the other judges; yet it was not upon the general principle, but upon the peculiar facts. All he doubted about was, whether the sale was justifiable. It appears to me that the sale in the case before us was a justifiable sale. All the witnesses agree that a new ship might have been built for less than it would have cost to put the one in question into a serviceable state. I am of

(a) *Read v. Bonham*, 6 Moore, 397, where the Court held, that where the captain sold the ship, because he could not get her repaired, the jury might find for a total loss.

1824.

 CAMBRIDGE
 v.
 ANDERDON.

opinion that the plaintiff is entitled to recover as for a total loss, because that which was sold did not exist as a ship at the time of the sale.

Adjourned Sittings at Westminster.

BEFORE LORD CHIEF JUSTICE ABBOTT.

April 26th.

MURLEY and Another v. LANGRICK.

A person is a competent witness for the plaintiff in an action for goods sold, though he is to receive a commission on the sale.

ACTION for goods sold.

In this case the evidence of a witness, who had been examined upon interrogatories, was read on the part of the plaintiff. The deposition stated, that he was to receive a commission upon the sale.

The defendant's counsel submitted, that this must prevent the evidence being read, as it shewed the party giving it was not a competent witness.

ABBOTT, C. J., inquired if the evidence stated that the commission was not to be received unless the money was paid; and being answered in the negative, held that the witness was competent.

Scarlett and Chitty, for the plaintiff.

F. Pollock, for the defendant.

[Attornies—*Patten and Swaine & Co.*]

1804.
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GARRETT v. HANDLEY.

April 29th.

**ACTION** on a guarantee in the following terms :

“ February 12, 1818.

“ John Garrett, Esq.

“ Sir,

“ I understand from Mr. Gibbons, that you  
 “ have consented to advance him 550*l*. I undertake to  
 “ *make provision for the repayment of the same, under*  
 “ *the arrangement now going on for settling Mr. Gibbons'*  
 “ *affairs.*”

Signed by the defendant.

The defendant was Gibbons' attorney. The guarantee  
 was proved, and also the advance of the money to Gib-  
 bons.

In an action on  
 a guarantee,  
 undertaking  
 to “ make  
 provision for  
 the repayment”  
 of a sum lent  
 to a third per-  
 son, the plain-  
 tiff must give  
 some proof that  
 no provision  
 has been made  
 by the defend-  
 ant, or he will  
 be nonsuited.  
 Slight proof  
 is, however,  
 sufficient.

ABBOTT, C. J.—The plaintiff must give some evidence  
 that no provision was made for the repayment; for this  
 was not a promise by the defendant to pay, but only to  
 make provision under the arrangement. *Non constat*  
 but he did so.

The *Attorney General*.—It is impossible for the plaintiff  
 to procure such evidence.

ABBOTT, C. J.—I know you need not give strong  
 proof, but some evidence is necessary. As that you asked  
 him what he had done; and his answer, that he had not  
 made provision: or something of that sort. If no such  
 evidence is given, the plaintiff must be called.

Nonsuit.

1834.

GARRET

v.  
HANDLEY.The *Attorney General* and *Richards* for the plaintiff*Jervis* and *Tindal* for the defendants.[Attornies—*Platt* and *Handley*.]

In the ensuing Easter Term, *Richards* moved for rule nisi for a new trial, which was granted.

By the stat. 29 Car. 2, c. 3, § 4, No action shall be brought on any promise to answer for the debt, default, or miscarriage of another, except it be in writing, and signed by the party to be charged therewith, or by some person by him authorized. But all guarantees must not only be in writing, and signed, but must be founded on a sufficient consideration: and by the case of *Wain v. Warlters*, 5 Ea. 10, confirmed by

the case of *Saunders v. Wain*, 4 B. & A. 595, the consideration must be stated in writing as well as the promise. A party need not declare on a guarantee as in writing, if he put it in writing at the trial it will be sufficient, and if the defendant makes a tender, it does away the necessity of this proof; for, by a tender the defendant admits the existence of the action. Peake's Rep. 15.

May 3rd.

DOR, on the Demise of SMITH, v. CARTWRIGHT

On an ejectment for a house, the land tax assessment of the parish in which the collector of taxes charges

**EJECTMENT** for a house in St. Anne's Lane, in the parish of St. John the Evangelist, Westminster.

George Fitzwater Hook died, seized of four houses in St. Anne's Lane, and by his will, dated 1777, devised

himself with the receipt of money from A. B. as tenant of a particular house, is evidence that A. B. was tenant at that time. The books of an insurance company, in which they entered themselves with the receipt of a sum of money, as a premium to insure a particular house against the occupation of A. B. from fire, are, also, evidence of his occupation. These entries are evidence, because the party making them charges himself with the receipt of money.

of the houses, which he described in his will, as "late in the possession of John Young," to the plaintiff's father, and devised the other three to a person whom the defendant represented; the defendant had had possession of all four for some years, and the difficulty now was, to say which house was "late in the possession of John Young."

1834.  
 Dox,  
 on the  
 Demise of  
 SMITH,  
 v.  
 CARTWRIGHT

To shew that it was the third house from Peter Street, the land tax assessment for the year 1771, was put in; it stated Young to be the occupier.

Curwood objected, that this was not evidence of who was occupier.

ABBOTT, C. J.—It appears, by the assessment, that the sum charged is paid, therefore the collector charges himself with having received the sum mentioned from John Young. It is, therefore, evidence.

The plaintiff's counsel next put in the books of the Westminster Insurance Company, to shew that this house was in the occupation of Young, and as such was insured by that office.

The entry in question stated, that George Fitzwater Hook had paid the Company 1*l*. 4*s*. as a premium to insure a house in the occupation of John Young, being the third house from Peter Street.

Curwood objected, that this was a mere entry in the private book of a third party, and therefore not evidence.

ABBOTT, C. J.—The company charge themselves with the receipt of 1*l*. 4*s*. premium, therefore it is evidence, on the same principle as a steward's book.

Verdict for the plaintiff.

1884.

Doz,  
on the  
Demise of  
SHEPHERD,

v.  
CAREWRIGHT

*Marryatt and Chitty* for the plaintiff.

*Curwood*, for the defendant.

[Attorneys—*Dodd and Stephenson*.]

May 1st.

RODWELL and Another v. REDGE.

In an action against a performer for not performing at a licensed theatre, pursuant to his contract, evidence that the performances have gone on without interruption, is sufficient *prima facie* evidence that the theatre is duly licensed.

THE plaintiffs were the proprietors of the Adelphi Theatre, and the defendant an actor, commonly known as Signor Paulo. The action was for a breach of the following agreement.

“ June 6th, 1883.

“ I, Paul Redge, do hereby agree to perform at the Adelphi Theatre for the two ensuing seasons (stating the respective commencements and terminations) at 3*l.* a week, subject to the usual terms.

(Signed) Paul Redge.”


“ The said Paul Redge to be entitled to introduce 25*l.* worth of benefit tickets on one night in each season, to be named by the manager.

(Signed) J. T. Rodwell.”

It was proved, that the defendant had notice to attend at the commencement of the season, and refused, and that there were performances in which he was very much wanted, being a favourite with the public.

For the defendant, two objections were made. 1st. That the plaintiffs were stated in the declaration to be the proprietors of a licensed theatre, and the licence had not

been proved; and 2ndly, that the contract appeared to be made with one of the plaintiffs only.

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 RODWELL  
 & Another  
 v.  
 REDGE.

ABBOTT, C. J.—I shall presume the licence from the fact that the performances went on. If it were not so, they would all be rogues and vagabonds (*a*).

In reply to the 2nd objection, it was urged, on the part of the plaintiffs, that the case of *Skinner and Stocks*, 4 B. & A. 437, was in point, and decisive against it (*b*).

ABBOTT, C. J. assented, and the jury found a verdict for the plaintiffs, damages 40s. his lordship observing, that it was important for the public to know, that these were engagements which ought to be performed.

*Scarlett and Chitty* for the plaintiffs.

*Marryatt*, for the defendant.

[Attornies—*Richardson and Rogers & Son.*]

(*a*) It seems to be no part of the case to be made out on the part of the plaintiff, that the theatre was licensed; the whole the plaintiff had to prove, was, the contract, and the breach of it. If the theatre was not licensed, that was matter of defence to excuse the breach of the agreement; and therefore, if it had not been a licensed theatre, it lay on the defendant to shew it as his defence: you might just as well, in an action for not accepting goods sold, which were foreign produce (such as brandies and the like) call on the plaintiff to prove that the brandies had paid the Custom-House duties; for that, if they had

not paid the duties, the contract for the sale of them was illegal. In the case of *Gallini v. Laboret*, 5 T. R. 244, where it appeared that the theatre was not licensed, the Court held, that no action could be maintained for the defendant's not performing there, in pursuance of his contract.

(*b*) 'The case of *Skinner & Ors. v. Stocks*, 4 B. & A. 437, decides, that if a party makes a contract with one of two or more partners, not knowing that there are other partners; either the partner who actually makes the contract, or the whole of the partners, may sue such party for breach of the contract.



1824.

## COURT OF COMMON PLEAS.

*Sittings after Hilary Term, 1824.*

BEFORE LORD GIFFORD, C. J.

Feb. 17th.

HAWKINS v. HOWARD &amp; GIBBS.

In an action against annuity brokers (who have become bankrupt), for laying out the money of the plaintiff on bad security, the solicitor under their commission is compelled to produce their books, under a subpoena duces tecum.

And an entry in their ledger is evidence, tho' the witness who produces it did not make the entry; and the solicitor under their commission is compelled to produce the ledger containing the account between them and the person to whom they advanced the money, to shew that they knew him to be in an insolvent state.

**THE** declaration in this case stated that the defendants received two sums of money from the plaintiff; one a sum of £3000, the other a sum of £1200, which they undertook to lay out for him in the purchase of life annuities, on good security; but that they laid out the money in the purchase of two annuities granted by George, Marquis of Blandford (since Duke of Marlborough), on his personal security only, and that the annuities had not been paid; and thereby the principal sums of money were totally lost. Plea—The general issue.

In support of this case, the solicitor to the assignees under the commission of bankrupt, which had issued against Howard & Gibbs (who were annuity brokers) was subpoenaed to produce the books of Howard and Gibbs.

*Wilde*, as counsel for the assignees, contended, that the books ought not to be produced, as the estate might be prejudiced: for that here it was contended that Howard & Gibbs had misapplied the plaintiff's money; if so, it was money had and received, and proveable under the commission.

**LORD GIFFORD, C. J.**—The books must be produced:

as the entries affect the very money in question in this transaction, the plaintiff is entitled to have them produced.

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HAWKINS

v.  
HOWARD &  
GIBBS.

A witness then produced the books. One of them was a ledger of Howard & Gibbs. The witness stated, that he had never made any entries in it; but it was copied from the day-book.

Lord GIFFORD, C. J.—This being the ledger of Howard and Gibbs, the entries in it are evidence against them.

The plaintiff's counsel wished to turn to the Marquis of Blandford's account.

Vaughan, Serjt., contended, that the Marquis of Blandford's account with Howard and Gibbs was not evidence.


Lord GIFFORD, C. J.—It is evidence; because the plaintiff alleges that the money was lost by being advanced to the Marquis for annuities.

The entry was read. It gave the Marquis credit for these sums; but he was not debited for the payment of these annuities.

The deeds, granting both these annuities, were proved, and read; and examined copies of judgments, to the amount of £300,000, against the Marquis, were also put in.

Lord GIFFORD, C. J., ruled, that there was no evidence that the annuities were not regularly paid, or that the money was not well laid out; for, as to the judgments, the Marquis might have property to a much larger amount.

Plaintiff nonsuited.

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 HAWKINS  
 v.  
 HOWARD &  
 GIBBS.

*Bosanquet* and *Cross*, Serjts., and *Evans*, for the plaintiff.

*Vaughan* and *Pell*, Serjts. for the defendants.

[Attornies—*Long* and *Gibbs*.]

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BEFORE BEST, C. J., PARK, AND BURROUGH, JR.  
 In Bank.

May 7th.

*Bosanquet*, Serjt., now moved for a new trial, on the ground that there was evidence to go to the jury, that the defendants had neglected their duty towards the plaintiff, and that the annuities were of no value.

The Court granted a rule to show cause.

This rule, however, never came on to be argued.

Feb. 17th.

JOHN LENS, Esq., Serjeant at Law, v. BROWN and Another.

Rateability of  
 Serjeant's Inn,  
 Chancery-lane.

**THIS** was an action of trespass against the defendants (who were overseers of the poor of the parish of Saint Dunstan in the West), for taking the plaintiff's goods.—Plea—The general issue (*a*).

(*a*) By statute 21 Jac. 1, c. 12, churchwardens, and other parish officers, may plead the general issue, and give special matter in evi-

dence; and the jury must find for the defendant, if the plaintiff omits to prove that the fact occurred in the county where the venue is laid:

The real question in this case was, whether the chambers of the Judges and Serjeants, in Serjeant's Inn, Chancery-lane, were situate within the parish of St. Dunstan, and therefore liable to contribute to the poor's rate of that parish.


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 & Another.

Admissions, signed by the attornies, were put in. By these the parties consented to admit, that the defendants took the plaintiff's goods; that the defendants were duly appointed overseers of the poor of St. Dunstan's, and were so at the time of the taking; that the plaintiff occupied the chambers, No. 1, Serjeant's Inn, and was assessed to the relief of the poor of the parish of St. Dunstan, in respect thereof, at the sum of 1*l.* 10*s.*; and that for that sum the present distress was taken.

To prove Serjeant's Inn out of the parish of St. Dunstan, the plaintiff's counsel put in an ordinance of the Parliament of the year 1646. It was read from *Scobell's Collection* (a printed book). Chapter 18th. ordained that the lands of all the bishops should be sold; but this ordinance was not to extend to Serjeant's Inn, where the Judges resided, which was stated to belong to the bishop-

and if the defendant obtains a verdict, or the plaintiff be non-suited, the defendant is entitled to double costs. And churchwardens and overseers, acting under a justice's warrant of distress to levy a poor's rate, are within the protection of the stat. 24 Geo. 2, c. 44, as to demand of perusal and copy of any warrant, and also as to the action being commenced within six months, &c. In order that an overseer or other officer may obtain double costs, it is necessary for his attorney to get a certificate from the Judge who tried the case, that the defendant was act-

ing in the execution of his office; but this certificate need not be granted at the time of the trial.—*Harper v. Carr*, 7 T. R. 448. But it is more prudent to get the certificate while the case is in the Judge's recollection. It should be observed, that this applies only to actions of trespass brought against churchwardens and overseers, and not to replevins. Churchwardens and overseers are not entitled to notice of action, as magistrates and revenue officers are.—See the notes on the case of *Levy v. Edwards*, ante (p. 40).

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rick of Ely: this the Judges were to have as before; but it was to be at the disposal of the Parliament after the then lease was expired.

An examined extract from the parliamentary survey of 1650, (preserved in Lambeth Palace), was put in. It described the then state of the living of St. Dunstan's; but did not at all mention Serjeant's Inn.

The land-tax act, 4 W. & M. c. 1, s. 33, was read. It enacted, that in all privileged and other places, whether *extra-parochial* OR NOT, assessors should be appointed although, in any monthly or other tax, such places had not been before charged; and such assessors should make assessments under this act, in like manner as in any parish, tithing, or place.

Mr. Hewlet produced examined copies of the duplicate land-tax assessments (b) for the year 1693, of the parish of St. Dunstan in the West, and of Serjeant's Inn; the two were separately assessed.

The defendants' counsel admitted that the land-tax was still assessed and collected in the same way, and that there were separate assessors and collectors of the land-tax for Serjeant's Inn.


The statute 1 Geo. 4, c. 59, was put in. It was a private act for uniting the rectory and vicarage of St. Dunstan. In a schedule to the act, every house in the parish of St. Dunstan was enumerated. None of the chambers of Serjeant's Inn were included in the enumeration; but the Serjeant's Inn coffee-house, which is a part of Serjeant's Inn, was named in the schedule as being in the parish of St. Dunstan.

Notice had been given to the defendants to produce the vestry-book of the 30th of November, 1743.

(b) Examined copies of the land-tax assessments, from the laying on of the land-tax in the reign of William the Third, may be ob-

tained at the Lord Treasurer Remembrancer's office, in Somerset House.

They produced it; and from it an order of vestry was read. It stated that a child had been dropped in Serjeant's Inn; and it ordered that the overseer should not provide for it, *as the parish had nothing to do with the poor of Serjeant's Inn*, and as the Inn paid no poor rates to the parish.

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Mr. Hewlet put in a receipt for the maintenance of the child, dated 26th January, 1743. It was signed by the *nurse*, and acknowledged the receipt of the sum from Serjeant Skinner, for nursing Mary Basket.—(The child was so called, from being left in a basket). He also put in a receipt from the parish clerk of St. Dunstan's, for the burial fees of Miss Mary Basket, also from Serjeant Skinner. He also put in receipts from the reader and clerk of the chapel of Serjeant's Inn, for their salaries.

The defendants' counsel admitted that there was a chapel in Serjeant's Inn, and that there had been service there, which had been paid for by the serjeants.

Receipts to the serjeants, for the maintenance of a woman sent to Bedlam from the Inn, and also for the maintenance of a pauper belonging to the Inn, were also put in, and it was proved by witnesses, that there was a parish boundary plate at each end of the Inn; that funerals from Serjeant's Inn paid double fees, as non-parishioners; that there were no pews for the serjeants in St. Dunstan's church; and that the serjeants kept the gates shut, so that the Inn never was perambulated by the parish.

From the cross-examination it appeared, that the chambers of Mr. Baron Graham, and Mr. Baron Garrow, were over the Serjeant's Inn coffee-house.

For the defendants.—The vestry clerk produced the parish books. From these it appeared that the parish had annually received from the younger judge of the Common Pleas, since the year 1615, an annual pension of

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2*l.* 13*s.* 4*d.* (i. e. 13*s.* 4*d.* per term): in some of the entries it was stated to be "for the poor." This payment is still regularly made.

He also produced a book called the Doomsday book; from it an entry was read, dated 1650. It was "account of money received of the *parishioners*, for providing buckets against fire." To this the judges contributed 6*s.*

From a book called the Churchwarden's Ledger was read a series of entries, which commenced "Receipts for licenses for eating flesh in Lent, and on other days, prohibited to the use of the poor," (c) and contained entries of 6*s.* 8*d.*, paid by Sir Julius Cæsar, Master of the Rolls, Mr. Justice Croke, and Mr. Serjeant Glanville, for licences to eat flesh.

A book called the assessment book was put in. In it the landlords and inhabitants were charged for a monthly aid to the Lord Protector. Under title "Chancery Lane," Serjeant's Inn was mentioned in the column of landlords; but no one was inserted as tenant. This was dated 1657.

(c) These licences for eating flesh were granted under the stat. 5 Eliz. c. 5, which was an act for maintaining and increasing the navy. By that statute it was enacted, that every person eating flesh on a Wednesday, or other fish day, should forfeit three pounds, or suffer three months imprisonment. But these penalties were not to extend to persons licensed; and for a licence lords of Parliament and their wives were to pay 26*s.* 8*d.*; knights and their wives 13*s.* 4*d.*; other persons 6*s.* 8*d.* to the poor's box of their parish; and persons sick were to be licensed by the rector, vicar, or curate of their parish, and if there was none, by the curate of the adjoining pa-

rish; but no licence was to extend to the eating of beef: and any person preaching, writing, or saying, that eating fish is of any necessity to the saving the soul of man, should be punished as a spreader of false news. This may seem rather a singular method of manning the British navy; but I take this apparently absurd act to have been passed, because the sudden abolition of *maigre* days by the change of religion, must have nearly ruined the fishermen, and therefore it was feared that they would join the Catholic party in disturbing the Government, as a Catholic Government would be more favourable to their vocation.

In the rate on the parish of St. Dunstan, for a poll tax, in 1677, Serjeant's Inn was charged.

From the churchwarden's account book were read, entries of sums paid for underpinning the Chief Justice's pew, and for cushions for the judges' pews.

A witness produced examined copies of several indictments tried at the Old Bailey, in which Serjeant's Inn was described as in the parish of St. Dunstan. They were all for perjury, except one, which was for petty larceny (*d*).

Witnesses proved that they had known rates constantly paid by the occupier of the Serjeant's Inn coffee-house, and it was agreed that that was a part of Serjeant's Inn.

Lord GIFFORD, C.J. told the jury, that the private act of 1 G. 4. c. 59, deserved great attention, because it enumerated every house in the parish in a schedule, and this Inn was certainly not included. However, the coffee-house, which was a part of the Inn, was included. It might be said that the Inn, being the property of the see of Ely, was exempt from tithes, as the property of Bishops often is. However, the schedule professed to enumerate every house in the parish. The conduct of the parish relative to the bastard child was very strong, for they expressly denied that they had any thing to do with the Inn; and the paying double burial fees was also worth attention; and these circumstances were much strengthened by the non-payment of rates for two centuries. As to the boundary plates at *each* end of the Inn, why need any be put up, if the whole place was, as it was contended to be, within the parish, and no boundary was there. The inference was, that at one boundary mark the parish of St. Dunstan ended, and at the other the parish began

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(*d*) These indictments proved nothing, because perjury and petty larceny need not be laid in the

parish in which they were committed, as burglary, stealing in a dwelling house, &c. must.



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again, leaving Serjeant's Inn out of the parish. For the defence, the payment of 2*l.* 13*s.* 4*d.* from the junior judge, is proved, that seemed to be a mere personal due, and not to be paid in respect of any building. The entry respecting fire ladders, it is said, may apply to Serjeant's Inn, Fleet Street, and that may be so. The licences to eat flesh must be obtained from the clergyman of the parish where the party dwelt. But there was nothing to limit the residence to Serjeant's Inn. The assessment of 1657 did not appear to have been paid, and therefore was of no weight. His Lordship left the case to the jury.

Verdict for the defendants.

*Vaughan*, Serjt. and *Tindal*, for the plaintiff.

*Pell* and *Taddy*, Serjts. and *Curwood*, for the defendants.

[Attornies—*Hewlet* and *Morshead*.]

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*Adjourned Sitzings in London.*

BEFORE LORD CHIEF JUSTICE GIFFORD.

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Feb. 20th.

POCOCK v. BILLING.

In an action on a bill of exchange, by indorsee against acceptor, the declarations of a former holder of the bill are evidence, if it can be shown that at that time he was holder of the bill, and was making such declarations to his own prejudice, and against his own interest.

**ACTION** for a bill of exchange, brought by the indorsee against the acceptor. It appeared that there had been several indorsements. The defence was, that there was no consideration for the bill, or the indorsements and that the whole transaction was fraudulent; and, to

can be shown that at that time he was holder of the bill, and was making such declarations to his own prejudice, and against his own interest.

show this, the defendant wished to give in evidence a conversation between a person named Pywell, who was one of the indorsers, and the witness, in which he stated, that he gave no consideration for the bill, and received no money for his indorsement.

This being objected to, on the ground that a statement of Pywell, when the plaintiff was not present, was no evidence, and that, in an action by indorsee against acceptor, what the indorser said could not be evidence against the indorsee.

*Vaughan*, Serjt. argued that as the present plaintiff, as indorsee, claimed through Pywell, what Pywell said was evidence against him.

*Bosanquet*, Serjt. on the same side, contended, that though this might be no evidence that the plaintiff gave no consideration, yet it was evidence that Pywell neither gave nor received any.

Lord GIFFORD, C. J.—I think that the declaration of Pywell is admissible, to prove that he gave no consideration for the bill.

The evidence was then received, and the jury, on this, and a good deal of other evidence, found a

Verdict for the defendant.

*Pell*, Serjt. and *Broderick*, for the plaintiff.

*Vaughan* and *Bosanquet*, Serjts. for the defendant.

[Attornies—*Robinson & H.* and *Orlebur.*]

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REPORT BY C. J., AND PARK AND BURROUGH, JS.  
In Bank.

*Pell*, Serjt. having, in Easter Term, obtained a rule to June 3rd.

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v.  
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show cause why there should not be a new trial in this case; it was now argued by *Vaughan* and *Bosquet*, Serjts. for the defendant, and by *Pell* and *Wilde*, Serjts. for the plaintiff.

BEST, C. J., in directing the rule to be made absolute, said—The question is, whether the declarations of a former holder of a bill of exchange are evidence of the want of consideration. I take it, that the declarations of the holder of the bill, *made while he has the bill in his hands*, are evidence; because at the time he speaks he is destroying his own rights; but if such person parts with the bill to-day, and to-morrow he says it was founded on a fraud, that declaration would not be evidence. The present case seems to have gone on this broad ground, that the declarations of any former holder of the bill are evidence; but I am clearly of opinion, that if Pywell had passed the bill away at the time of the declaration, what he says is not evidence. I do not think that the rule, which allows what one man says to be evidence against another, ought to be extended; and whenever a party offers the declarations of a third person in evidence, he must clearly prove, that such third person was making such declarations against his own interest, or they ought not to be received.

Rule absolute for a new trial.

Feb. 23rd.

PECKHAM v. POTTER.

In an action by the indorsee of a bill against the acceptor, the declaration of the drawer is admissible in

**THIS** was an action by the indorsee of a bill of exchange against the acceptor. The bill was drawn by a person named Pennel, on the defendant, payable to his own order, for 300*l.* at two months after date.

evidence, to show that the bill was obtained by fraud. The plaintiff must be, however, shown to be in some way privy to the fraud.

The bill was put in, and the acceptance and indorsement proved. Notice of disputing the consideration had been given by the defendant (a).

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POTTER.

The defence was, that the bill had been obtained by fraud, and that the defendant was privy to the fraud.

The defendant's counsel wished to give evidence of Pennel's declarations acknowledging the fraud.

*Faghan*, Serjt. contended, that Pennel's declarations were not evidence in this action.

LORD GIFFORD, C. J.—What Pennel said is evidence, *in this action*, of the original consideration of the bill; but the defendant must prove that the plaintiff is in some way privy to the fraud, or he will be entitled to a verdict (b).

Evidence was given to show that the defendant was ~~consent~~ of the fraud.

### Verdict for the defendant.

(a) Notice of a defendant's intention of disputing the consideration of a bill is often given; but in point of law it makes no difference in any case, whether it is given or not. The plaintiff is in no case bound to prove a consideration; in an action on a bill, &c. proving the signatures is legally enough; and if a defendant has given no such notice, it is still open to him to dispute the consideration. The only use of such a notice is, that if a defendant has evidence to impeach the consideration, and has given no such notice,

the plaintiff's counsel, in reply, will insist that they could have proved a consideration, had they known it would have been disputed: and, therefore, where a defendant is sure that they cannot prove a consideration, he had better put them on doing it by giving notice; but still, if he has given the notice, the plaintiff may rely on the formal proofs, and leave the defendant to prove a want of consideration, if he can.

(b) See the case of *Pocock v. Billing*, *supra*, page 230.

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 v.  
 POTTER.

*Vaughan, Serjt. and Wilde, for the plaintiff.*

*Pell, Serjt. for the defendant.*

[Attornies—*Jones and Wright.*]

BEFORE MR. JUSTICE PARK.

*Feb. 24th.*

**CARLISLE and Others, Assignees of RUSSEL, a Bankrupt,  
 v. EADY.**

If a bankrupt has had his certificate, and has released his assignees, it is sufficient, on an objection to his competency as a witness in an action by his assignees, for him to state that he has released his assignees, without producing the release.

**THIS** was an action on several promissory notes, of which the bankrupt was payee. The defendant pleaded the general issue, his own bankruptcy, and the statute of limitations.

To prove an admission of the debt by the defendant, to take the case out of the statute of limitations, and avoid the effect of the defendant's bankruptcy, the plaintiff's counsel called the bankrupt Russel; on the *voir dire* he stated, that he had obtained his certificate, and released his assignees.

The defendant's counsel called for the production of the release.

**PARK, J.**—In all the years I have known Guildhall, I never knew such a release called for. It is quite sufficient for the bankrupt to state, on the *voir dire*, that he has obtained his certificate, and released his assignees. He is then a competent witness.

The bankrupt was then examined.

Verdict for the plaintiff.

Poll, Serjt. for the plaintiff.

Faughan, Serjt. for the defendant.

[Attornies—James and Spencer.]

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& Others,  
Assignees of  
RUSSEL,  
a Bankrupt,  
v.  
EADY.

The rule is, that on *voir dire* the witness may be asked the contents of written papers, to show that he is incompetent, or, that having been shown, to restore him to his competency: and the reason of this is, that an examination on *voir dire* is not evidence in the cause, but evidence to the judge, for him to decide whether the witness is competent to give evidence in the cause. In the case of *Ingram v. Dale*, before Lord ELLENBOROUGH,

at Guildhall, which was an action by an administrator, the next of kin being called, was subjected to on *voir dire*, but was allowed to say in re-examination that he had released. Freeman, and other corporators, are allowed, on *voir dire*, to say that they have been disfranchised. But if the witness produces the written paper, which is supposed to make him incompetent, it ought to be read to see whether he is so or not.

# HARRISON v. ALLEN.

Feb. 26th.

THIS was an action for goods sold and delivered. The declaration consisted of the common money counts, and no special count.

On the part of the plaintiff, it was proved, that in the month of March, 1818, the defendant was supplied with the goods, to the value of 196*l.*; he was to have them on sale or return, and if he did not return them within the year, he was to pay for them with interest.

If goods are supplied on sale or return within a year; after the year is expired, if the goods have not been returned, the seller may recover the price on a common count for goods

sold and delivered, without any special count.

1894.

HARRISON

v.  
ALLEN.

More than a year had elapsed before the bringing of the action.

*Taddy*, Serjt. objected, that the contract being special, for the sale or return of the goods, the plaintiff could not recover on the common count, for goods sold and delivered, but ought to have declared specially, on the breach of the special contract.

PARK, J.—When the time of credit expired, the plaintiff was entitled to bring his action, and if the year elapsed, and the goods were not returned, the price of them became a mere simple debt.

Verdict for the plaintiff, for 196*l.* and interest.

*Vaughan*, Serjt. and *Chitty*, for the plaintiff.

*Taddy*, Serjt. for the defendant.

[Attornies—*Collins* and *Stevens & Wood.*]

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BEFORE BEST, C. J., AND PARK AND BURROUGH, JS.  
In Bank.

May 6th.

*Taddy*, Serjt. now moved for a new trial, on the ground, that this was a special contract, and that interest could not be recovered on the common count, for goods sold and delivered, and cited the case of *Gordon v. Swan*, 12 East, 419.

BEST, C. J.—The Court cannot, in this case, grant a new trial, because substantial justice has been done. The only rule the Court could grant, would be to reduce

the verdict to the amount of the debt, without interest ; but as that would only lead to the bringing another action for the interest, the Court, in mercy to all parties, must refuse that rule.

1824.  
HARRISON  
v.  
ALLEN.

The other judges concurred.

Rule refused.

The cases of *Leeds v. Burrows*, 13 East, 1. *Mussen v. Price*, 4 East, 147. *Gordon v. Swann*, 13 East, 419. *Slack v. Lowell*, 3 Taunt. 157, go to show, that if goods are sold on credit, a plaintiff may recover on the common count for goods sold, when the credit has expired. But it is much more

prudent to add one or more special counts on the contract, as it was ; for, in *Gordon v. Swann*, the jury had not given interest from the time when the credit expired, and the Court would not disturb the finding of the jury, and refused a motion for a new trial.

### MILLER v. WARRE.

Feb. 26th.

**ASSUMPSIT**, on a policy of insurance on the ship *Aurora* and her freight, at and from Grenada to London, with leave to call at all, or any of the West India Islands.

The loss was by perils of the seas.

The ship had sailed on her outward voyage, with stores for different estates in that island, but the defendant had not insured her on that voyage.

On the 16th of January, 1823, the ship arrived, after her outward voyage, at Grand Mal Bay, in the island of Grenada, and there delivered part of her outward cargo, and remained 48 hours ; she then proceeded to different

A ship going from London to Grenada, and back, having been 48 hours in a port in Grenada, has concluded her outward voyage. If she goes afterwards to other parts in the same island, to deliver outward cargo, and receive contracts for homeward freight, and so is lost, this is a loss on

her homeward voyage. A ship-owner who has entered into contracts for freight has an insurable interest in the freight, though the contracts are not in writing. If a bill of exceptions is tendered to a judge, the facts still go to the jury, but a demurrer to evidence stops the case.



1894-1  
Mullen  
v.  
Warren.

bays in that inland, and delivered other parts of her outward cargo.

At each of these bays, the captain entered into verbal contracts with the agents of different estates, for them to ship sugars on board the Aurora, on her voyage home; and the quantity each agreed to ship he entered in a book. The ship then proceeded to Grenville Bay, to deliver the residue of her outward cargo, and on entering that Bay was totally lost. None of the homeward cargo had been taken on board.

For the plaintiff, it was contended, that the outward voyage was terminated by her staying 48 hours in Grand Mal Bay; and that, as soon as she left Grand Mal Bay, the homeward voyage commenced, and the homeward policy of the ship attached; and as to the freight, as contracts were made for the sending of the sugars, the plaintiff had an insurable interest in such freight, and could recover for it on this policy, though none of the sugars had been actually put on board.

For the defendant, it was urged, that if the outward voyage had ended at Grand Mal Bay, the ship's going to the different ports to deliver outward cargo, was no prosecution of the homeward voyage, and was, therefore, a deviation. And as to the freight, there was no written contract to oblige the agents of the estates to send a particular quantity of sugar; it was a mere understanding between them and the captain, that they were likely to have those quantities of sugar to be put on board his ship.

PARK, J.—I am clearly of opinion, that in this case there was no deviation; the outward voyage of the ship had ended by her being 48 hours in Grand Mal Bay, and she proceeded to the other Bays, not only to deliver the remainder of the outward cargo, but to get contracts for

her homeward cargo; in fact, these ships always go from port to port in the West India islands. In the case of *Camden v. Cowley*, 1 Bl. 418, the ship was lost in going from port to port, to deliver her cargo. Lord Mansfield, at first, held it was a deviation, but the Court above were of a different opinion, and other cases have followed on the same principle (a).

As to the freight, the cases have decided, that if there is a contract for freight, the under-writer is liable, and I think a written contract is by no means necessary (b).

*Vaughan*, Serjt. tendered a bill of exceptions, as to the supposed deviation.

*Taddy*, Serjt. contended, that a bill of exceptions stopped the case from going to the jury.

*PARK, J.*—On a bill of exceptions, the case always goes

(a) The case of *Cruickshank v. James*, 2 Taunt. 301, decides, that a ship insured at and from Jamaica to London, may go from port to port, in Jamaica, without being guilty of a deviation. *Leigh v. Mather*, 1 Esp. 412, decides, that where a ship is insured to an island generally, the policy determines by her being 24 hours in any port of that island. The cases of *Hammond v. Reed*, 4 B. & A. 12, and *Solly v. Whitmore*, 5 B. & A. 46, decide, that if a ship touches at a place for any purpose, unconnected with her voyage, it is a deviation, though by the terms of the policy she has leave to touch there.

(b) In *Montgomery v. Eggington*, 3 T. R. 362, it was held, that where by the loss of the ship the

freight insured was totally lost, the party was entitled to recover the whole amount, though only part of the goods were on board, the rest being ready to be put on board; and in *Patrick v. Eames*, 3 Camp. 442, Lord Ellenborough laid down, that if a contract be proved, for supplying the ship with a full cargo, at a stipulated rate of freight, and by some event the assured had been deprived of a profit they must otherwise have certainly received, they would have a right to resort to the under-writers for a full indemnity. "Nor should I," said his lordship, "have considered it material, whether that contract was, or was not, under seal, or whether it was written, or merely verbal."

1824  
MILLER  
v.  
WARREN.

1824.  
 RICHARDSON  
 v.  
 MELLISH.

double the amount of such consideration, and his or their ship be discharged.

Lord GIFFORD, C. J., intimated, that points of this sort had better be discussed in another stage of the cause; and left it to the jury to say whether the agreement had been given up: and if they thought it had not, they would find a verdict for the value of the two voyages which remained on the death of Captain Mills.

Verdict for the plaintiff — Damages, £7,500.

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BEFORE BEST, C. J. AND PARK AND BURROUGH, JS.  
 In Bank.

In the ensuing Easter Term, *Pell*, Serjt., obtained a rule nisi for a new trial, or for arresting the judgment.

Jun 29th. This rule now coming on to be argued, the Court called on the defendant's counsel to support the rule. And

*Pell*, *Lawes*, and *Wilde*, Serjts.; contended there ought to be a new trial:—1st. Because the jury had given damages for the loss of the two voyages which were to come after the death of Captain Mills; whereas they ought only to have given damages for that one subsequent voyage which had been actually made.

2d. That the book containing the number of passengers, was not admissible in evidence.

3d. That the agreement was illegal.

4th. That there was no consideration for the agreement.

On the first point they argued, that the jury could not give damages for the two voyages; because, as one of them remained now to be made, circumstances might still happen to prevent the possibility of the last voyage being

made at all:—such as, the loss of the ship, or the plaintiff's death before that voyage, or his declining to go on it, or the defendant might still appoint him for that voyage; and therefore the defendant had only broken the agreement by not sending him on that voyage; and, consequently, all the injury he had sustained, and all that he might sustain, was the loss of that one voyage only: and as the captain is appointed separately for each voyage, each omission to appoint is a separate breach; and if the plaintiff had intended to sue for the two breaches in one action, he should have staid till the last of the voyages was complete.

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On the second point they argued, that as the book is kept under the act of parliament for a specific purpose, when that purpose was answered the book was of no further use, and had no reference to these parties or to this dispute between them.

As to the third point, the illegality of the agreement, it was urged, that this sort of bargain was a fraud on the East India Company and on the other owners, for they were entitled to the fair unbiassed choice by the defendant; and if he appoints for a pecuniary or other consideration, they are injured, because he does not appoint the person he would, if no consideration passed; and they cited *Card v. Hope*, 3 Dow. & Ry.: and by the statute 49 Geo. 3, c. 126, the provisions of the stat. 5 & 6 Edw. 6, c. 16, are extended to “all offices, commissions, places, “and employments, belonging to or under the appointment or control of the united Company of Merchants of “England trading to the East Indies;” and by the earlier statute, any person who shall make any promise, agreement, bond, or assurance, for any money, reward, or fee, in respect of the sale of any office, shall be disabled from holding the office; and the words of the last statute are quite large enough to take in the commands of the East India Company's ships.

On the fourth point it was contended, that there was no

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consideration for this agreement; because, when the defendant bought the ship, he had a right to turn out the plaintiff and appoint another captain: the plaintiff's consent was not required for the appointment of Captain Mills, and therefore he merely consented to what he had no power to hinder.

BEST, C. J.—On the first point I am clearly of opinion, that the jury might give damages for the loss of both voyages; for when the defendant broke the agreement, by sending out another captain, it was manifest he did not mean to abide by it, and therefore the jury were right in giving damages for the breach of the whole agreement: if they were not so, the number of actions would be infinite.

As to the second point, I think the book clearly admissible. It is a public document, made from returns on oath, given in under an act of parliament; and is evidence, the same as the books of the Bank and other public books.

It appears to me, on the third point, there is no ground for saying there was any fraud on the East India Company; for they knew of the exchange, and the acts of parliament relate only to money or direct emolument, and not to exchanges like the present.

As to the last point, I think that unless it clearly appears on the record that there was no consideration, we should be bound to presume in favor of the consideration, after verdict; but this mutual exchange, if it is not illegal, is an abundant consideration.

PARK, J., observed, that the book was clearly evidence as a public document; and that the jury were right in giving damages for the two voyages.

BURROUGH, J.—If there is something to be done on one side, and something on the other, it has always been held, that this is a sufficient consideration to support a

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*permea.* I think also, that the statute 49 Geo. 3, applies only to the public situations and offices under the Company, and not to the commands of their ships, which are merely in their trade as merchants. As to the damages, the agreement is for four voyages; and the defendant, by disposing of the ship, has put it out of his power to perform the rest of the bargain.

Rule discharged.

*Vaughan* and *Bosanquet*, Serjts., for the plaintiff.

*Pell*, *Lawes*, and *Wilde*, Serjts., for the defendant.

[Attornies—*Swains & Co.* and *Street & Co.*]

GIBSON v. MINET and Another.

Feb. 28th.

**ASSUMPSIT** for money had and received.

The plaintiff was a merchant, at Cork, who kept cash with the defendants, who were bankers, in London; and the question was, whether a sum of 400*l.* in the defendants' hands, belonged to the plaintiff, or to Messrs. Minter & Co. From the admissions in the cause, it appeared, that in the month of May, 1822, the plaintiff's balance in the defendants' hands, was 543*l.* 7*s.* 10*d.* and that, on the 8th of May, 1822, he wrote to the defendants the following letter (which was delivered to them by Mr. Minter, on the 13th of July, 1822.)

" Waterford, 8th July, 1822.

" Messrs. Minet & Stride.

" Gentlemen,

" I request you to hold over four hundred pounds, from my private account, to the disposal of J. Minter & Co.

" Wm. Gibson."

If a person direct his banker to hold a sum of money at the disposal of a third person, the party so ordering may countermand his order at any time before the banker has paid the money to such third person, or entered into some equivalent arrangement with him, incompatible with a countermand of the order.

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 GIBSON  
 v.  
 MINET  
 & Another.

Soon after the receipt of this letter, one of the defendants wrote with a pencil on the debet side of the plaintiff's account, in their ledger—"By Mr. Gibson's letter, of 8th July, 1822, 400*l.* is to be held at the disposal of Messrs. Mintor & Co."

On the 18th of March, 1823, the plaintiff wrote to the defendants, that the 400*l.* was only at Messrs. Mintor's disposal, to answer any losses that might have occurred in a speculation, which had turned out successful; and, therefore, desired they would hold the money to his (the plaintiff's) use.

On the 2nd of April, 1823, the defendants received a letter from Messrs. Mintor, desiring that the money should be still held at their disposal.

On the 9th of April, 1823, entries were made in the defendants' books, debeting the plaintiff, and giving credit to Messrs. Mintor for this sum.

And on the 9th of April, 1823, the defendants wrote to the plaintiff (enclosing an extract of the letter of Messrs. Mintor, dated April 2nd, 1823) in the following terms:

"London, 9th April, 1823.

"Mr. Wm. Gibson.

"Sir,

"We sent to our friend, Mr. Mintor, a copy  
 "of your letter, of 18th March, and having received  
 "his answer, we hasten to transmit you the annexed ex-  
 "tract, *according to which, we now transfer from your*  
 "account, the 400*l.* you directed to be held at his dis-  
 "posal.

"We are, &c.

"Minet & Stride."

In addition to this, a witness for the defendants proved, that when Mr. Mintor delivered the first letter, Mr. Stride asked him if he would have the money; he said no, - I only wish it to be held at my disposal; and Mr. Stride said it should be so.

On the part of the plaintiff, it was contended, that the bankers not having paid over, or transferred, the money to Messrs. Mintor, and as no transfer was made till the 9th of April, 1823, the plaintiff might revoke his order, and have the money held to his use; and cited *Williams v. Everett*, 14 Ea. 582.

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GIBSON  
v.  
MINTOR  
& Another.

The defendants' counsel contended, that the defendants agreeing with Mintor to hold the money for him, was such a transfer, as put it out of the plaintiff's power to countermand his order.

LORD GIFFORD, C. J.—The only question is, whether Mintor asked the bankers, at the time of delivering the order, to hold the money absolutely for him, or whether he only desired them to hold it at his disposal, in case he should want it for the purposes of the speculation, in which the plaintiff and himself were engaged. If the latter were the case, the plaintiff is entitled to recover.

Verdict for the plaintiff, for £400.

*Vaughan* Serjt. for the plaintiff.

*Pell*, Serjt. and *F. Pollock*, for the defendants.

[Attornies—*Holt* and *Dawes & Chatfield*.]

BEFORE BEST, C. J. AND PARK AND BURROUGH, JS.  
In Bank.

*Pell* now moved for a new trial, on the grounds which were urged at the trial.

May 7th.

BEST, C. J.—I concur with the opinions of the judges in the case of *Williams v. Everett*; and the whole question is, whether at the time when the money was trans-



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v.

MINTOR  
& Another.

ferred to Mintor, he was in the first instance asked would have the money; he says, "no, hold it at disposal." That is certainly not a paying over by the bankers; and after the countermand they say, "transfer to Mr. Mintor," and then enter the transfer in their books. If, while the authority remained, he had drawn the money out, the plaintiff would have been bound, but before that was done, the order was legally countermanded.

PARK and BURROUGH, Js. concurred.

Rule ref

In the case of *Williams v. Everett & Ors.* 14 East, 582, a person named Kelly, had remitted bills to the defendants, for them to pay 300*l.* to the plaintiff, and various other sums to other persons. The defendants received the money on the bills; but, when called upon, refused to pay over the 300*l.* to the plaintiff. The Court held, that under these circumstances, the plaintiff could not maintain any action for money had and received, against the defendants, there being no privity of contract, express or implied, between them; Lord Ellenborough saying, "by the act of receiving the bill, the defendants agree to hold its con-

tents, when paid, for the use of the plaintiff. The remitter may give such countermand his directions, as he pleases, and the person to whom it was remitted, is bound to pay the bill, or its amount, to the remitter himself; *some engagement entered into by the remitter, with the person to whom the object of the remittance was directed, have precluded themselves from doing, and have appropriated the remittance to the use of a person. After such a circumstance, they cannot retract the directions they have once given, but are bound to hold it for the use of the pointee.*"

# CASES

AT

## NISI PRIUS.

AT THE

*Sittings in and after Easter Term.*

### COURT OF KING'S BENCH.

*Sittings in Middlesex, in Easter Term, 1824.*

BEFORE MR. JUSTICE LITLEDALE.

*(Who sat for the Lord Chief Justice.)*

MAYOR v. HUMPHRIES.

1824.

*May 17th.*

**THE** declaration stated, that the defendant was before and at the time, &c. owner of a certain stage coach; and that he, in consideration, &c. undertook, &c. to carry the plaintiff safely; that the plaintiff, confiding, &c. did go by the coach, and that the servants of the defendant so negligently and unskilfully "*drove, conducted, and managed*" the said coach, that the coach was overturned, and plaintiff injured.

It appeared, that when the coach overturned, it was proceeding at a furious rate, and that on its going over one of the wheels came off.

The defence was, that the coach overturned, not from the negligence of the driver, but from the linch-pin coming out; and therefore, that this action being for an injury done by the negligent driving, the plaintiff could not recover.

In an action by a passenger in a coach against the owner for an injury done him by the coach overturning; if the declaration states that the servants of the defendant negligently "*drove, conducted, and managed*, the coach," the plaintiff cannot recover, if the negligence was in sending out an insufficient coach.

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 MAYOR  
 v.  
 HUMPHRIES.

*Gurney*, in reply, contended, that it was just as actionable for the defendants to injure their pass by negligently sending out an insufficient coach, as a coachman.

LITTLEDALE, J.—I am decidedly of opinion, that the accident happened from the insufficiency of the coach. The plaintiff cannot recover on this declaration. His negligence was in sending out an unsound coach. The plaintiff should have laid it so in his declaration. I have no hesitation in saying, that the words “conducted and managed,” coupled with the word “drove,” mean conducting and management, *ejusdem generis* with management, as respects the providing of a coach.

His lordship left it to the jury to say, whether the injury arose from negligent driving, or an insufficient coach.

Verdict for the plaintiff, damages :

*Gurney* and *Comyn*, for the plaintiff.

*Scarlett* and *Chitty*, for the defendant.

[Attornies— .]

There can be no doubt that stage coach proprietors are equally liable for injuries sustained by their passengers, from their negligence, whether that negligence is in having a bad or negligent coachman, or an insufficient coach. But it is, of course, necessary to declare for the negligence that you can prove; and, indeed, I can see no objection, if there be the least doubt as to what misconduct of the coach owners, or their servants, was the cause of the accident, to laying it different counts. It has been held that the overturning, or falling down of the coach, is *prima facie* evidence of negligence on the part of the owner of the coach. 79. But the owner of the coach is not liable for the personal injuries sustained by the passengers, in any accident, not arising *in* consequence from the negligence of the owner of the coach, or his servants. 2 Camp. 81:

1824.

RUDGE and Another v. FERGUSON.

May 17th.

**THIS** was an action by the assignees of an insolvent debtor, against a creditor, who was alleged to have received a sum of money which ought to have gone to the assignees to have been distributed among the whole body of the creditors generally.

The insolvent himself was called as a witness for the plaintiffs.

In an action by the assignees of an insolvent debtor, to recover money from one of the creditors, which ought to have gone to the general fund, the insolvent is not a competent witness on the part of the plaintiff.

*Gurney*, for the defendant, objected, that every insolvent is interested in enlarging the estate.

*Scarlett*, for the plaintiffs.—The insolvent is equally a debtor, whether, by his evidence, he procures the money to be recovered by the assignees, or to be retained by the present defendant. He has the same sum to account for out of any future property he may acquire: it only changes the party to whom he is liable.

*Gurney*.—It is important for him to deliver himself from future responsibility. A bankrupt, in such an action, is clearly an incompetent witness; because, by his evidence, he may increase the funds, so as to make them pay 20s. in the pound, and leave a surplus for himself.

**LITLEDALE, J.**—It appears to me this witness has an immediate interest in getting the money into the hands of the assignees.

The witness was then rejected.

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 RIMELL  
 v.  
 SANFAYO.

the horses; and also, that when he took the horses back his master advanced him £5, to help to pay for them. It appeared that the defendant had paid the coachman all that was due to him under their agreement.

LITTLEDALE, J. — The principal question will be what representation was made by the coachman at the time of the hiring. If he made the contract in his own name, and represented to the plaintiff the agreement between himself and his master; of course, under such circumstances, the plaintiff cannot recover. But if he made no such representation of any agreement between himself and his master, I think that, by the master's sending him forth into the world, wearing his livery, to hire horses which he (the master) afterwards uses, knowing of when they were hired, and yet not sending to ascertain if his credit had been pledged for them, an implied authority is given, and the master is bound to pay the hire. This sort of bargain between a gentleman and his coachman appears to be rather unusual, and ought not to prevent the plaintiff from having recourse to the master. A master may be prevented by business, or want of time, from making a bargain himself, and may send his servant; and provided the business be within the regular department of the servant, the master is clearly liable.

The jury, after inquiring of his lordship, whether, in his opinion, there was evidence of any direct application to the master by the plaintiff, and receiving an answer in the negative, found a

Verdict for the defendant.

*Scarlett and Chitty*, for the plaintiff.

*Marryatt and Barnewall*, for the defendant.

[Attornies — *Hitchcock and Addis*.]

1824

*Sittings after Easter Term, in London.*

BEFORE LORD CHIEF JUSTICE ABBOTT.

LAING v. MEADER.

June 2d.

**WORK** and labour. Balance claimed, 15*l.* 16*s.* The defendant pleaded a tender.

The witness called to prove it, stated, that the plaintiff and defendant were at a public-house together: the defendant took out of his pocket between £60 and £70, and said, "If you will give me a stamped receipt, I will pay you the money." The plaintiff replied that he would not take it, but would serve him with a Marshalsea writ.

A plea of tender is not supported by proving that the defendant took a sum of money out of his pocket, and said to the plaintiff "If you will give me a stamped receipt, I will pay you the money:" as by the stat. 43 G. 3, c. 126, the payer of money may provide the stamp, and charge for it: and a tender must always be unconditional.

ABBOTT, C. J.—This is no proof of a tender: the offer of the money must be unconditional. A party has no right to say, "I will pay you the money, if you will give me a stamped receipt;" but he ought, according to 43 Geo. 3, c. 126, to bring a receipt with him, and require the other party to sign it (a).

Verdict for the plaintiff.

Gurney and Talfourd, for the plaintiff.

Scarlett, for the defendant.

[Attornies — Arden and Harnett.]

(a) By § 4, of that act, the person from whom the money is due may provide the stamp, and require the receiver to give him a receipt, and pay the amount of the stamp duty; and if the receiver refuses, he is liable to a penalty. A tender

must be in money, and the money ought to be produced: it should be unconditional; and, in general, a tender of a larger sum, with a request to have change, is not good.

1824.

*Adjourned Sitzings at Westminster.*

BEFORE MR. JUSTICE LITLEDALB.

*(Who sat for the Lord Chief Justice.)*

June 8th.

REX v. MARY HAILEY.

An indictment for perjury may be supported against a marksman, for swearing falsely in an affidavit, tho' it would not be receivable in the Court it was sworn in, because the jurat did not state that it had been read over unto the party swearing it: but the person administering the oath must prove, that the party swearing it in fact understood its contents.

The perjury is complete at the time of the swearing of the affidavit; and whether it is receivable in the Court or not is immaterial, if the reason why it is not receivable is, that some formal regulation is not complied with.

**INDICTMENT** for perjury, in two affidavits, sworn before Master *Trower*, relative to a bankruptcy.

The first of the affidavits was produced by a clerk from the secretary of bankrupt's office.

The affidavit was signed with the mark of the defendant, and the jurat did not state either where it was sworn, or that the affidavit was read over to the party.

*Andrews* objected, that this affidavit could not be read, on account of these omissions in the jurat, and called a witness, who was a clerk in the master's office, in Southampton-buildings, who stated, that in cases where the party swearing the affidavit could not write, the jurat ought, after stating the place where it was sworn, to state that the witness to the mark of the deponent had been first duly sworn; that he truly, distinctly, and audibly read over the affidavit to the deponent, and saw the mark affixed.

*Taunton*, for the prosecution, contended, that the Court ordering the jurat to state particular things, was merely matter of direction. If the Court finds the affidavit not according to rule, it will not allow it to be read, and yet perjury may be assigned on it. The false swearing is not the less perjury because the jurat is not regular in form.

**LITTLEDALE, J.**—There must be evidence given that the affidavit was sworn in Middlesex, and as the defendant is illiterate, it must be shewn that she understood it. In those cases, where the affidavit is made by a person who can write, the supposition is that such person was acquainted with its contents; but in the case of a marksman it is not so. If in such a case the master, by the jurat, authenticates the fact of its having been read over, we give him credit; but if he does not, and the fact were so, he ought to be called to prove it. I should have difficulty in allowing the parol evidence of any other person as to that fact. My opinion is, that though the affidavit be deficient in point of form, yet, if it distinctly appear that it was sworn in Middlesex, and that the party swearing was acquainted with its contents, it would be sufficient; and the mere practice of the Court of Chancery could only affect its reception in that court, and not prevent an indictment for perjury being founded on it; for the perjury is complete at the time of the swearing.

**Master Trewer** being called, proved, that the affidavit was sworn at his house, and that that is in the county of Middlesex; but he did not know whether the affidavit was read to the defendant or not.

**LITTLEDALE, J.**—You cannot prove an assignment of perjury on this affidavit, there being no evidence whatever of any reading over in the presence of the deponent.

The counsel for the prosecution were then about to proceed on the other affidavit (which had a perfect jurat); but it appearing that it referred to the former affidavit,—

**LITTLEDALE, J.**, ruled, that it could not be read.

**Verdict**—Not Guilty.

1824.  
 ~~~~~  
 Rex
 v.
 MARY
 HAILEY.

You cannot convict for perjury on an affidavit, if it refers to a former affidavit, which you are not in condition to prove.

1824.
 Rex
 v.
 MARY
 HAILRY.

Taunton and Russell, for the prosecution.

Andrews, for the defendants.

[Attornies—*Bigg* and *Henney*.]

BEFORE LORD CHIEF JUSTICE ABBOTT.

June 9th.

REX v. WILLIAM SPENCER.

On an indictment for perjury, the proving the handwriting of the signature of the person who administered the oath, is sufficient proof that it was sworn; and if the place at which it was sworn is mentioned in the jurat, that is sufficient evidence that it was sworn at that place.

INDICTMENT for perjury in an answer in Chancery. The indictment stated, that the prosecutor, John Taunton and Russell, had exhibited his bill in Chancery for the performance of an agreement, whereby the defendant agreed with the prosecutor, that if the prosecutor lay out 200*l.* in building two fourth-rate houses, the defendant would execute a lease of a certain piece of land in St. Anne's-place, *adjoining the new houses*, and the prosecutor should enjoy a way which the defendant used; and that the bill interrogated, whether the defendant had not signed this agreement; and that the defendant in his answer swore, that when he executed the agreement, it contained the words, "so long as the right of way along such way remains in William Spencer and William Pritchard." Which words had been erased. On this the perjury was assigned.

To support this indictment, a person from the Clerk's Office produced the original bill and answer, and a witness proved the defendant's signature to the bill.

A clerk from the Master's office, Southampton, proved Master Trower's signature to the jurat.

Gurney objected, that it was not proved that the answer was sworn in the county of Middlesex.

1824
 ~~~~~  
 Rex  
 v.  
 WILLIAM  
 SPENCER.

ABBOTT, C. J.—The Courts always give credence to the signature of the magistrate, or commissioner; and if his signature to the jurat is proved, that is sufficient evidence, that the party was duly sworn; and if the place at which it was sworn is mentioned in the jurat, that is sufficient evidence that it was sworn at that place.

The jurat was read; it was “sworn at the Public Office, “Southampton-Buildings, *London*, this eighth day of “March, 1823, before me,

“James Trower.”

The witness however stated, that the Public Office in Southampton-Buildings is in the county of Middlesex, and not in the city of London.

*Gurney*—Your lordship can give no credit to this jurat as evidence, as one part of it must be untrue; for either the answer was sworn in London, and not in the Public Office, or was sworn at that office, and not in London.

*Scarlett, contra*—The jurat must be taken to be correct evidence, except where it is proved to be wrong; we have proved that the Public Office is not in London, but in Middlesex.

ABBOTT, C. J.—I shall not stop the case on this objection, you may have the benefit of it hereafter.

The bill in Chancery was read. It stated the agreement to be the same as it was described in that part of the indictment which set out the substance of the bill, except that it stated, that the defendant agreed to execute a lease

*Variance.* If an indictment for perjury in an answer in Chancery recites the bill as for a specific performance of an agreement (*inter alia*) for a lease of land “adjoining the

“new houses,” and in the bill it is “adjoining the new house,” this is a fatal variance, though the perjury is not assigned on any thing sworn as to this clause of the agreement.

1824.  
 REX  
 v.  
 WILLIAM  
 SPENCER.

of certain ground, in St. Anne's Place, "adjoining the new house," instead of "adjoining the new houses."

The defendant's counsel contended, that this was a variance.

ABBOTT, C. J.—The indictment professes to set out the substance of the bill, and this is materially different; for, in the bill, the land is said to be contiguous to one house; in the indictment, to more than one. This is a fatal variance.

The defendant was therefore acquitted.

*Scarlett and Hutchinson*, for the prosecution.

*Gurney and E. Lawes*, for the defendant.

[Attornies—*Norton and Stratton & A.*]

In the case of *Hoare v. Mill*, 4 M. & S. 470, the plaintiff declared in covenant, on a lease of a wharf and *store-house*; when the deed was produced, it ap-

peared to be a lease of a wharf and *store-houses*; this was held to be a fatal variance, though the breach was assigned on that part of the deed.

June 12th.

PHILLIPS v. MOSELY and Others.

If the issue is, **TRESPASS** for breaking and entering the plaintiff's house. Pleas—General issue; and 2nd, that the house was the freehold of the defendant, Mosely; and that the plaintiff is tenant of the defendant under a demise, "for one year, from the 23rd of April, 1821, and thence afterwards, from year to year;" evidence that the plaintiff has paid the defendant rent, is not sufficient proof of the demise in issue.

rent were his servants. Replication, that though it was Mosely's freehold, yet the plaintiff held it as tenant to Mosely, *under a demise, from the 23rd of April, 1821, for one year, and thence afterwards from year to year.* On this fact, issue was joined.

1824.  
PHILLIPS  
v.  
MOSELY  
& ORS.

A witness for the plaintiff had proved payment of rent; but stated, on cross-examination, that the plaintiff had said, he held under a written agreement.

ABBOTT, C. J.—The plaintiff ought to put in this agreement, because, on this issue, he undertakes to prove a demise, for one year, from the 23rd of April, 1821, and afterwards, from year to year.

The *siger*, for the plaintiff, contended, that as the agreement was not the ground of the action, any species of evidence that showed the plaintiff to be tenant was sufficient.

ABBOTT, C. J.—Not on this issue; and besides, the evidence given, of payment of rent, is consistent with a demise, very different from that laid. Payment of rent would be as much proof of a demise, for 21 years, as of the demise laid in the replication.

The cause was, however, referred to arbitration.

The *siger*, for the plaintiff

Marryatt, for the defendant.

[Attornies, Willoughby and Pitman.]

1824.

*Adjourned Sitzings after Easter Term, in Lond*

June 14th.

BROWN v. ROBINSON.

Administering medicines while in the service of another person, as an apothecary's assistant, is not a practising as an apothecary, within 55 Geo. 3, c. 194, § 22, though the person so administering the medicines is himself paid for them.

**ASSUMPSIT** for an apothecary's bill. By the statute 55 Geo. 3, c. 194, s. 22, no apothecary shall be allowed to recover any charges, in any court of law, unless he proves on the trial, that he was in practice, as an apothecary prior to, or on the 15th of August, 1815, or that he obtained a certificate to practise as an apothecary, from the master, wardens, and society of apothecaries.

To prove that the plaintiff had practised as an apothecary, before the 15th of August, 1815, three witnesses were called, who proved, that he had attended them as apothecary, prior to that time, but that during the whole time of such attendance, he was an assistant in the house of another apothecary, though they always paid the plaintiff, and not the person he was assistant to.

**ABBOTT, C. J.**—This is nothing like proof that plaintiff practised as an apothecary. No practice, while in the service of another, can be a practising under this act.

Plaintiff nonsuited

*Clarkson*, for the plaintiff.

*Gurney*, for the defendant.

[Attornies—*Kelyng* and *Russen*.]

See *Walmisley v. Abbott*, *infra*, and the notes to that case.

1824

MONK v. NOYES.

June 15th.

**COVENANT** against a tenant, for not keeping the house demised in repair. Plea—*Not guilty* of breaking the covenant (a), and issue joined thereon.

Under a covenant, that the tenant "should and would substantially repair, uphold, and maintain," a house, he is bound to keep up the inside painting.

ABBOTT, C. J. ruled, that under the words of the covenant, that the tenant "should, and would, substantially repair, uphold, and maintain the said house," the tenant was bound to keep up the painting of inner doors, inside shutters, &c.

Verdict for the plaintiff, damages £150.

*Chitty* and *Steer*, for the plaintiff.

*Gurney* for the defendant.

[Attornies—*Teague* and *Myers*.]

(a) In practice we very often see this plea put on the record; it is wrong: the general issue (if in covenant there can be said to be one) is *non est factum*: performance of a covenant ought to be pleaded specially; and, I believe, no case has occurred, where the plea of *non infregit conventionem* was demurred to, in which it was not held to be bad. In *Taylor v. Needham*, 2 Taunt. 278, which

was an action of covenant for not repairing, the Court, on this plea being demurred to, held it bad on two grounds: because it was too general, several breaches being assigned; and because the breach of it being—not repairing, two negatives would not make an issue. In several other cases, the Courts have held, that this plea is bad; however, it is good after verdict. Cowp. 588.

1884.

June 15th.

MARIA PEREZ COSIO &amp; PINEYRO v. DE BERNALES.

Husband and wife, trading as partners in Spain, cannot sue as such in our courts, without proof being given, that by the law of Spain a *feme covert* is allowed to trade. Whether on such proof an action could be maintained by both—*Quære*.

**ASSUMPSIT** for money had and received.

In the course of the plaintiff's case, it appeared, that the two plaintiffs were husband and wife, and that they carried on trade in Spain, as partners.

*Scarlett*, objected, that the wife ought not to have joined in the action, as she, as a *feme covert*, could have no property.

**ABBOTT, C. J.**—The plaintiff must give some evidence, that, by the law of Spain, a *feme covert* in that country is authorized to have separate property, and trade on her own account.

The plaintiffs' counsel not having any such proof,

**ABBOTT, C. J.** held, that the plaintiffs must be nonsuited, because he could not presume, that a *feme covert*, in Spain, could engage in trade; and as these parties sued in an English court, they were bound to shew, that they had put a proper plaintiff on the record, according to the law of Spain, before the question could be raised, whether a husband and wife, being partners in trade, in Spain, could sue as such in our courts. A *feme covert* carrying on business as a sole trader, in the city of London, may, by the custom of London, sue in the city courts, but not in these courts.

Plaintiffs nonsuited.

It is extremely probable, that when the action was brought, the plaintiffs' attorney was not aware that the two plaintiffs were husband and wife, one being named Cosio, the other Pineyro; but no thing is more common on the

Continent, than for the wife not to take her husband's name, but to continue to be called by the name she bore before her marriage. It is also not unfrequent for the wife to continue to use her own christian and surname, with

*Gurney and Kaye*, for the plaintiffs.

*Scarlett*, for the defendant.

[Attornies—*Freshfield & K.* and *Liversedge*.]

1824

MARIA  
PEREZ COSIO  
& PINEYRO  
v.  
DEBERNALES

the addition of her husband's surname. By the custom of London, a *feme covert* carrying on trade in the city, without the interference of her husband, is considered in the City courts as a sole trader; but she cannot sue in the courts at Westminster; and even in the City courts, her husband must join in actions. In the case of *Beard v. Wall*, 2 Bos. & P. 98, Lord Ellenborough says, "This custom is one of those customs called executory customs; the meaning of which is, customs united to the courts of the city of London. They are pleadable in London, and not elsewhere, except so far as they may be made use of in the superior courts by way of bar." A wife may sue, and be sued, alone, if her husband is transported; this has long been considered as settled, as far as her power of suing during the time the sentence is actually in operation. But the case of *Curral v. Blencow*, 4 Esp. 27, carries it further—This was an action for goods sold. The defence was, the coverture of the plaintiff. The plaintiff's counsel, put in the record of the husband's conviction of a felony, in March, 1794, when he was sentenced to 7 years transportation. On this, it was objected, that the term of transportation had elapsed (the trial being on the 3rd of June, 1801) and therefore, that the hus-

band was competent to sue: but Lord ALVANLEY, C. J., ruled, that the record gave the wife a right to sue, as a *feme sole*, and that such right remained till the husband's return; and that though the term of transportation was expired, yet, if the defendant meant to rely on the fact of the husband having actually returned, the defendant must shew that by evidence. No such evidence being given, there was a verdict for the plaintiff. Another case in which a *feme covert* may sue, and be sued, as a *feme sole*, is, where her husband, being an alien, is abroad, and has deserted his wife; but in *Kay v. The Duchess de Piennes*, 3 Camp. 123, Lord Ellenborough seems to confine this to cases where the husband has never been in this country. But in the cases of husbands, who are Englishmen, going abroad, and deserting their wives, it appears, that the wife cannot be sued, as *feme sole*. In *Marsh v. Hutchinson*, 2 Bos. & Pul. 226, which was an action for goods sold; the defendant's husband was agent for the English Packets, at Brill, in Holland, and on the invasion of that country by the French, in 1795, sent his wife to this country, he himself remaining in Holland. HEARN, J. says: there is a great difference between an Englishman going abroad, and leaving



1824.

## COURT OF COMMON PLEAS.

*Sittings in Easter Term, at Westminster.*

BEFORE LORD CHIEF JUSTICE BEST.

May 7th.

CAMERON v. BAKER.

**ASSUMPSIT** on the common counts.

An attorney being employed for a man by his father, to defend an action; if he knew of his retainer, and did not disapprove of it, he is bound by the acts of such attorney, in the same way as if he had himself employed him.

This action was brought to recover a compensation for the maintenance and education of the illegitimate child of the defendant.

The plaintiff had married the mother of the child, and the defendant was its reputed father. It appeared that legal proceedings had been commenced against the defendant for seduction. The defendant's father employed an attorney to conduct his defence; the defendant knew of this and did not disapprove of it.

If the father of an illegitimate child consents to pay an annual sum for its support, he will be bound to continue to do so, or to provide for the child himself, or to give the most distinct notice of his intention to pay such annual sum no longer.

*Pell*, Serjt. objected that what the attorney so employed did, would not bind the defendant.

his wife in this country, and a foreigner doing so. The former may be compelled to return, at any time, by the king's privy seal. There is not any case, where the wife has been holden liable, the husband being an Englishman. And in *Bogget v. Friar*, 11 East, 301, it was held, that in the case of an Englishman, no absence, except banishment, or something in

the nature of a civil death, gave the wife the character of a *feme sole*. In general, where the cause of action would survive to the wife, she must join in the action; but in actions for goods sold, or money lent, during coverture, the husband must sue alone, as the wife could have no property in the goods or money.

BEST, C. J.—If he knew of the attorney being employed for him, and did not disapprove of it, the acts of the attorney are evidence.

1824.  
CAMERON  
v.  
BAKER.

The attorney stated that it was agreed that the action for seduction should be compromised, on the defendant allowing £20 a-year for the maintenance of the child.

Witnesses proved that the plaintiff maintained and educated the child, at a much higher expense than £20 a-year.

BEST, C. J.—Should you not show some authority from the defendant.

Wilde.—We shall show that he has paid £20 a-year, and on the authority of the case of *Heskett v. Going*, 5 Esp. Rep. 131 (a), he must continue to do so, unless something has been done to put an end to that arrangement.

(a) The case of *Heskett v. Going*, 5 Esp. 131, was an action of assumpsit for the board and lodging of the defendant's illegitimate female child. The child had been nursed at the plaintiff's house, and frequently visited there by the defendant. The defence was, that no order of filiation had been made by any magistrates; and that, though the plaintiff had formerly kept the child by the defendant's consent, the defendant had since taken the child to his own house, whence she was taken back to the plaintiff's by her mother. It however appeared that the defendant knew of the child's being so taken back, and had taken no steps to get her away again. Lord ELLENBOROUGH ruled,

that the father of an illegitimate child was liable to pay for the nursing and board of such child, if he has adopted it as his own, and acquiesced in its being disposed of in any particular way. If he took it away, he had a right to keep it in his own care; and if the mother took it away, and put it to a person to nurse, without his consent, that person could not charge the father, as he could only be charged on his own contract: but here the child was taken back to a place where the defendant knew it had been before, and if the jury thought he acquiesced in the child's continuing there, he returned to his former liability. The jury found for the plaintiff.

1884  
 CAMERON  
 v.  
 BARRER.

A witness proved receiving £5 per quarter from the defendant for the child's maintenance.

BEST, C. J.—The father of an illegitimate child is not in the first instance bound to maintain it, unless compelled to do so by an order of magistrates; but if he consents to pay an annual sum for its support, he must continue to do so, or provide for the child at his own expense, or give the most distinct notice of his intention to pay such annual sum no longer.

Verdict for the plaintiff, for £20.

*Vaughan*, Serjt. and *Wilde*, for the plaintiff.

*Pell*, Serjt. for the defendant.

[Attornies—*Freeman* and *Leigh*.]

May 7th.

JENKINS v. SLADE.

A certificated conveyancer can maintain no action for his fees.

**ASSUMPSIT** for work and labour, as a certificated conveyancer, with the common counts.

The plaintiff's clerk proved that the conveyancing was done by the plaintiff, who was a certificated conveyancer, to the amount of £18; and that 2*l.* 4*s.* 6*d.* had been paid by the plaintiff to a barrister for settling one of the drafts; and 4*l.* 16*s.* 6*d.* to a law stationer for engrossing them.

There was no defence.

BEST, C. J.—I am of opinion that a certificated conveyancer can maintain no action for his fees. How can any

jury say what his labour is worth? What the plaintiff has paid out of pocket he may recover, but not his own fees.

1834  
JENKINS  
v.  
SLANE.

Verdict for the plaintiff.—Damages £7.

Vaughan, Serjt. and Justice, for the plaintiff.

[Attornies—Taylor and Richardson.]

### *Sittings in Easter Term, in London.*

BEFORE LORD CHIEF JUSTICE BEST.

SMITH v. HENRIETTA MAXWELL.

May 8th.

THIS was an action against the defendant as acceptor of a bill of exchange.

The formal proof on the part of the plaintiff was given.

The defence was the coverture of the defendant.

To establish this a witness was called, who stated that he was present when the defendant was married to Major Maxwell, at Ballinrow, in Ireland, by a gentleman who had officiated for many years as curate of that place. That the family were all present, and the ceremony was performed in a private room, it being the custom for persons of respectability in Ireland to have it performed in that manner.

A marriage in Ireland by a clergyman of the established church is good, though it takes place in a private room, without any special licence.

For the plaintiff it was submitted, that this was not sufficient evidence of a legal marriage.

BEST, C. J.—In this country it would not do without a

1824.

SMITH.

v.

HENRIETTA  
MAXWELL.

special licence; but in Ireland, if the ceremony is performed by a clergyman of the established church, it is quite sufficient, though not in a church.

The daughter of the defendant was then called, and proved that her father and mother lived together till within the last 5 years, and that she saw her father a few days previous to the trial.

The jury then, under his Lordship's direction, found a verdict for the defendant.

*Vaughan and Taddy*, Serjts. for the plaintiff.

*Pell and Firth*, Serjts. for the defendant.

[Attornies—*Holt and Jacques & B.*]

May 8th.

NICHOLLE v. PLUME.

The acceptance of goods by the buyer, if they are above £10 value, and there has been no written memorandum of the contract, under the statute of frauds, must be clear and unequivocal; and the Court wont allow a constructive acceptance to be sufficient.

**THIS** was an action for the price of a quantity of cider supplied by the plaintiff, on the verbal order of the defendant.

A witness proved his being present at the defendant's, when the bargain was made, and that the cider was good cider for the price. It was sent by the waggon to the defendant, who refused to take it in; but caused it to be lodged in a warehouse near his premises, but not belonging to him. It was not returned to the plaintiff, nor did the defendant send any notice to the plaintiff of his intention not to use the cider.

*Taddy*, for the defendant, submitted, that the plaintiff must be nonsuited, there being no acceptance, and no

contract in writing, to take the case out of the statute of frauds.

1824  
NICHOLLE  
v.  
PLUMF.

*Vaughan* and *Pell*, for the plaintiff, contended, that as the defendant had contracted for the cider, and it was in consequence forwarded to him by the waggon, that was sufficient; and particularly as he did not send notice to the plaintiff of his refusal to accept it.

BEST, C. J.—There must be an unequivocal acceptance. The Court of King's Bench have so determined in the case of *Hanson v. Armitage*, 1 Dow. & Ry. 128 (a).

Nonsuit.

*Vaughan* and *Pell*, Serjts. for the plaintiff.

*Taddy*, Serjt. for the defendant.

[Attornies, *Bennett* and *Chilton*.]

(a) In the case of *Hanson v. Armitage*, the defendant, a grocer in Yorkshire, had ordered two chests of tea of the plaintiff, a tea-dealer in London. The teas were forwarded to Stanton's wharf, to be sent by sea; and, on the voyage, the vessel in which they were was lost. No evidence was given, to show whether the order was written or by parol; but it was proved, that goods which had been before sent to the defendant had been received for him at that wharf. The invoice was not sent till after the loss of the ship was known. It was objected, that there was no sufficient delivery or acceptance, to take this out of the statute of frauds. The Court, after taking time to consider of their judgment, thought it was best to adhere to the strict and express words of the 17th section of this

statute. The words require an acceptance by the party himself, and the Court thought it would not be right to suffer any constructive acceptance to satisfy its provisions, in the absence of an express contract in writing. The words of this section of the statute of frauds (29 Car. 2, c. 3,) are:—  
“No contract for the sale of any  
“goods, wares, and merchandises,  
“for the price of ten pounds or upwards, shall be good, except the  
“buyer shall accept part of the  
“goods so sold, and actually receive the same, or give some  
“thing in earnest to bind the bargain, or in part of payment, or  
“that some note or memorandum  
“in writing, of the said bargain, be made, and signed by the parties to be charged by such contract, or their agents thereunto  
“lawfully authorized.”

1824.

June 15th.

**BENNETT and Another, Assignees of HALL, v. SPACKMAN.**

A bill of exchange given in payment to a person who becomes bankrupt, is a good payment, tho' the bill does not become payable till after the bankruptcy, if the party paying did not know of the insolvency of the bankrupt.

**ASSUMPSIT** to recover money expended by the bankrupt for the defendant, in the erection of several houses.

The act of bankruptcy was committed on the 27th of February, 1823.

To cut down the demand, several bills of exchange were given in evidence, and among the latter, a bill dated Dec. 11th, 1822, at four months from the date, was offered.

*Pell*, for the plaintiffs, objected. This bill became due on the 14th of April, 1823, which was after the act of bankruptcy, therefore it cannot be admitted.

**BEST, C. J.**—It is receivable in evidence; because it is a good payment, unless it was made with a knowledge of the insolvency of the bankrupt; and it will be for the jury to say whether it was so made or not.

*Vaughan*, for the defendant, then asked the bankrupt what he did with the bill when he received it, and was answered, that he indorsed it immediately to a person who was waiting for it at the time.

**BEST, C. J.**, upon this was of opinion, that it must be considered as a payment made to the bankrupt on the day when it was drawn, as he had paid it away then; and that day being before the act of bankruptcy, the payment was a good payment.

Verdict for the plaintiff, for the balance.

*Pell* and *D. F. Jones*, for the plaintiffs.

*Vaughan*, Serjt. and *Hutchinson*, for the defendant.

[Attorneys—*Maugham* and *Rigby*.]

## FROMONT v. COUPLAND.

May 15th.

**ACTION** for use and occupation of stables. Plea—General issue; with notice of set off.

The plaintiff and defendant had been connected in the proprietorship of a Bath stage-coach. Each of them ran the coach a certain part of the journey, and provided all that was necessary for that part. The plaintiff retired from the concern, and the defendant took his stables, and it was for the rent of them that the action was brought.

It appeared that the plaintiff by his agent received all the profits, and had to divide them between the parties, according to the distance each ran the coach.

Accounts were rendered every week by the plaintiff to the defendant, which contained a statement of the receipts and disbursements during the week, and the proportion due to the plaintiff and defendant, for the number of miles that each ran the coach.

These accounts the defendant offered as evidence of a set off; and it was acknowledged, that if they were received, they would shew a balance in favour of the defendant.

It appeared that there were other general accounts between them as partners.

BEST, C. J. directed a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit, by introducing the accounts as a set off.

*Vaughan*, Serjt. and *Chitty*, for the plaintiff.

*Pell* and *Wilde*, Serjts. for the defendant.

[Attornies—*Hurst* and *Peardon*.]

In an action for use and occupation of stables, the plaintiff and defendant having formerly been connected in a stage coach concern, weekly accounts delivered by the plaintiff to the defendant, by which it appeared that the plaintiff received the profits for the purpose of dividing them, and which stated the sum due to the defendant for the week, are not evidence of proper matter of set off. To become matter of set off, the balance in the partnership account must be final.



1884

FROMONT  
&  
COUPLAND.

In Trinity Term, *Pell* moved to enter a nonsuit, pursuant to the leave given at the trial, arguing that the plaintiff and defendant were not partners in the general concern, because each had a distinct share in the profit and loss. According to these accounts the plaintiff had a part and the defendant a part, and the plaintiff had in his hands the portion due to the defendant.

BEST, C. J.—Is that any thing more than a mode of dividing the profits? These weekly accounts do not shew a general balance; there may be actions to be brought, and the balance cannot be ascertained till they are decided.

*Pell*, *non constat*, but the other accounts spoken of were in favour of the defendant.

He submitted, 1st, that these parties were not partners in the general concern; or, 2ndly, if they were, that these were accounts settled: in either of which cases they might be received in evidence, and he cited *Barton & Hanson* 2 Taunt. 49; *Smith & Burrow*, 2 T. R. 476; and *Rackstraw & Imber*, Holt, N. P. C. 368.

BEST, C. J.—I am clearly of opinion on principle, that these accounts are not properly a set off. Undoubtedly these persons are partners: they are engaged in carrying passengers; they receive a certain sum, and are answerable to the public. The balance struck must be on the final adjustment of the partnership accounts; but in these accounts there is no such balance, for it is proved that there are other general accounts. Actions might be brought for damage to goods, &c. which would go to reduce the general yearly accounts, and therefore it would be great injustice to make these weekly ones decisive. Unless we were to hold that an action might be brought by

one partner against another, on every settled item, we cannot say that these weekly accounts are proper matter of set off.

Rule refused.

1824.  
FROMONT  
v.  
COUPLAND.

*Sittings in Easter Term, in London.*

BEFORE LORD CHIEF JUSTICE BEST.

EVANS v. SWEET.

May 29th.

**ACTION** for false imprisonment, in which the question intended to be tried, was, whether the sheriff can by law put in bail to render a party, without or against the consent of the party so rendered. But it was found, on examining the pleadings, which were very long, that the only issue on the record was, that by the rejoinder it was alleged, that two persons, named Rickerby and Young, became bail, at the request of the sheriff; and in the surrejoinder, the plaintiff denied this, and issue was therefore joined on the fact of request or no request of the sheriff.

The issue that R. & Y. became bail, at the request of the sheriff, is proved by shewing that they became bail at the request of the sheriff's officer, to prevent the sheriff from being fixed.

It was clearly proved, that these persons became bail at the request of the sheriff's officer, and that he got them to become bail to render, to prevent the sheriff from being fixed, and himself from ultimately being compelled to pay the debt.

Cross, Serjt. and *Thessiger*, contended, that this did not prove an authority from the sheriff to put in bail; because, though the under-sheriff is the general officer of the sheriff, and his acts are the acts of the sheriff, yet with the bailiff it is otherwise.

BEST, C. J.—I am clearly of opinion, that the officer, in

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this instance, acted for the sheriff, and that his request is the request of the sheriff. I must nonsuit the plaintiff.

Nonsuit.

*Cross*, Serjt. and *Thessiger*, for the plaintiff.

*Pell* and *Wilde*, Serjts., and *Wightman*, for the defendant.

[Attornies—*Pitcher* and *Wheeler*.]

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*Pell*, Serjt. obtained a rule *nisi*, for a new trial; but on cause being shown, the Court were clearly of opinion that the nonsuit was right. The rule for a new trial was therefore discharged.

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### *Sittings after Easter Term, at Westminster.*

BEFORE LORD CHIEF JUSTICE BEST.

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June 1st.

DIXON v. VALE and Others.

If a witness, being cautioned that he is not obliged to answer questions which tend to criminate him, still does answer such questions, he cannot afterwards take the objection to any further question, relative to that whole transaction.

**A**SSAULT and battery. Plea—General issue; *2nd*, *Molliter manus*; and *3d*, That the plaintiff attempted to make a forcible entry into the house of one of the defendants, and that he, assisted by the others, as his servants, repelled such attempt, using no more force than was absolutely necessary. Replication—*De injuria*.

One of the plaintiff's witnesses, in his cross-examination, stated, that he had become bankrupt; and *Peake* asked him as to the removal of certain goods, which had been taken from his house after his bankruptcy.

BEST, C. J. told him he was not bound to answer this, as it might criminate him.

The witness said he had no objection to answering, when —

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BUT, C. J. laid down, that if a witness, being cautioned that he is not compellable to answer a question that may criminate him, chooses to answer it, he is bound to answer all questions relative to that transaction, and cannot be allowed to object, that any further question has a tendency to criminate him.

The justification having been proved, there was a

Verdict for the defendant.

*Vaughan* and *Pell*, Serjts. and *F. Pollock*, for the plaintiff.

*Peake*, Serjt. for the defendants.

[Attornies—*Watson & B.* and *Richardson.*]

### *Sittings after Easter Term, in London.*

BEFORE LORD CHIEF JUSTICE BEST.

SIMS v. KINDER.

June 2nd.

**SLANDER.** The declaration stated a *colloquium* between the defendant and Benjamin Hopkinson: That the defendant, another officer, to whom the plaintiff had been a bailiff's follower, says he robbed him: such communication is confidential, and is as much privileged as the communication of a master in giving a character to a servant; and in such a case it is competent to the master, under the general issue, to put in proof any part which goes to show, that, in making the slanderous assertions, he was not actuated by malice.

*Slander.*—

If the plaintiff has applied to the under-sheriff of Middle-

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defendant said of the plaintiff, "he is a rogue and a thief, and has robbed me:" and, as special damage, it was laid, that Benjamin Hopkinson, being the under-sheriff of Middlesex, would have nominated him a sheriff's officer, but by reason of these words, he refused to do so, whereby the plaintiff lost great gains, which would have accrued to him by such nomination.

The defendant pleaded, 1st, the general issue; and 2nd a justification; which stated that the plaintiff, having been servant of the defendant, during the time of such service received sums of money, to wit, 8*l.* 13*s.* 6*d.*, for and on account of the defendant, his master, from J. H., G. S. J. B., and C. B., which said sums the defendant wrongfully and dishonestly secreted and embezzled; wherefore, the defendant spoke the words, &c. as he lawfully might, &c. Replication—*De injuria*.

From the evidence of Mr. Hopkinson, the under-sheriff it appeared that the defendant had been for many years a sheriff's officer, and that the plaintiff, who had been his follower, had sent an application to the sheriff's office to be appointed a sheriff's officer. The under-sheriff saw a person named Crook, of whom he made inquiries, and on seeing the defendant, said, Crook tells me that Sims who formerly lived with you, is a thief, and has robbed you many times; on which the defendant replied "what Crook has told you is very true." And the under-sheriff further stated, that he made these inquiries for the purpose of ascertaining whether the plaintiff was a fit person to be appointed an officer; and in consequence of what the defendant said, he refused to appoint the plaintiff.

Several witnesses proved that they were attorneys, and would have employed the plaintiff, had he succeeded in getting the appointment.

The defence was, 1st, that this was a confidential communication, and therefore no action could be maintained for any slander it might contain, unless the defendant spoke the slander from malicious motive; and it was

**likened to the case of giving a character to a servant; and**  
**2nd, That the facts stated in the plea were a justification**  
**of the words.**

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Witnesses proved that the plaintiff had received sums of money for his omitting to arrest one of the persons named in the justification, a warrant for such arrest having been given to the defendant; and the niece of the defendant proved, that when charged with having kept the monies of the defendant, the plaintiff said he was sorry for it, and must work it out.

The defendant's counsel wished to give in evidence, that other sums of money had been received by the plaintiff, of persons who were not mentioned in the plea.

**Taddy, Serjt.**, objected, that as the plea only justified the slander, because the plaintiff had kept money paid him by some particular persons, the defendant could not give other transactions of the same kind in evidence.

**BEST, C. J.**—I am clearly of opinion, that this conversation with the under-sheriff was confidential, and entitled to just the same protection as communications relative to the character of servants; and therefore, as words spoken under such circumstances, are not actionable without malice; on the question of malice or no malice, I am clearly of opinion, that any fact which goes to show that the defendant spoke *bona fide*, and without malice, is admissible in evidence; and further, that it is admissible on the general issue.

The plaintiff was nonsuited.

In the case of *Rogers v. Sir Gervais Clifton*, 3 Bos. & Pul. CHAMBER, J. says, "I take the law to be well settled, that where a master is applied to for the character of a servant, the former is not called upon in an

"action, to prove the truth of any  
 "aspersions thrown out by him  
 "against the latter; but that it  
 "lies upon the servant to prove  
 "the falsehood of such aspersions;  
 "and in such case the master is  
 "justified, unless the servant

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*Taddy*, Serjt. and *Adolphus*, for the plaintiff.

*Vaughan* and *Pell*, Serjts. and *Comyn*, for the defendant.

[Attornies—*Brooks* and *Platt*.]

"proves express malice." And in the case of *Swatton v. Tarpley*, K. B. Mich. T. 1821, (MS.) The Court held, that a servant could maintain no action for any thing said by a master, in giving a character, whether in writing or otherwise, unless there be malice; but that malice might either be shown from the communication itself or from matter *dehors*, and

that if there were no evidence of malice, the judge should nonsuit; but if there were any evidence of malice, the case should go to the jury on the question of malice or no malice. In the case of *Carrol v. Bird*, 3 Esp. 201, Lord Kenyon laid down, that a servant could bring no action against his master for not giving him a character.

June 2d.

PARKINS v. COBBET.

**Evidence.** — To let in secondary evidence, the best evidence of loss of the original document, that the case admits of, ought to be given. If a party has delivered over a letter to his daughter, and previous to the trial a witness has made diligent search for it, assisted by the daughter, and could not find it; this is not sufficient

**ACTION** to recover the price of a horse, sold by the plaintiff to the defendant. The defence was, that the horse was not sold, but only lent to the defendant; and to show this, it was sought to give parol evidence of the contents of a letter sent by the plaintiff to the defendant. To prove the loss of the original letter, the defendant's son proved, that as soon as the defendant received it, he gave it to his daughter to take care of, as was his practice with all his letters; and that two days before the trial, the witness and his sister searched in all the places where the defendant's letters were kept, but could not find the letter in question.

*Vaughan*, Serjt., objected, that this was not sufficient evidence of loss, to let in proof of its contents without calling the daughter. But if the party had kept it in his own custody, and had set a person to search, who could not find it in any of the places where letters were kept, that would be sufficient.

evidence of the loss of the letter: the defendant's daughter ought to be called.

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*Pell*, Serjt., and *D. F. Jones*, contended, that all that was ever required was reasonable proof of loss; and if a search was made in all places where letters were kept, that was sufficient *prima facie* proof of loss.

*Barr*, C. J. — You must, in all cases, give the best evidence of the loss of the original writing that the case admits of. If this letter had not been traced to the defendant's daughter, evidence that the defendant had employed the witness to search in all places where he kept letters, would, I take it, have been sufficient *prima facie* evidence of loss, to let in secondary evidence of the contents of this letter; because no better evidence could be reasonably expected to be given: but here it is traced to the defendant's daughter, and therefore she must be called; and if she is not, secondary evidence cannot be given of the contents.

The defendant's daughter not being in court, was of course not called, and the evidence was rejected.

Verdict for the plaintiff.

*Vaughan*, Serjt., and *Cooper*, for the plaintiff.

*Pell*, Serjt., and *D. F. Jones*, for the defendant.

[Attornies—*Duncombe* and *Faithful*.]



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*Adjourned Sitzings after Easter Term, at W*

BEFORE LORD CHIEF JUSTICE BEST.

June 10th.

DOB, on the Demise of BULKELEY, v. WILFORD

If in a fine there be a patent ambiguity, the fine is void; but if there is a latent ambiguity, it may be explained by evidence. If a fine is levied of twelve houses, it revokes a previous will *quoad* those houses: but evidence may be given to show that the testator had 19 houses, and that a particular 12 were meant by the fine.

**EJECTMENT** to recover houses and lands at Chelsea. The lessor of the plaintiff was the heir at law of General Wilford; the defendant was the widow of the General, devisee of all his property under his will.

It appeared that General Wilford had made a will, by which he devised the whole of his property to his widow, the defendant; but subsequently to the execution of his will, he sold a small portion of a property which was called the Ranelagh property, to the governors of Chelsea Hospital. Their solicitor not asking the title as it then stood, General Wilford levied a fine of "twelve messuages, twelve gardens, twenty of meadow, with the appurtenances, &c. in the parishes of Chelsea." There was no deed to lead the uses of this fine, and it was therefore contended, on the part of the plaintiff, that this fine revoked the will.

To show that this fine did not extend to all the General's property in Chelsea, evidence was given that he had nineteen houses in Chelsea, but twelve of them were in the Ranelagh property; and a deed, dated 12th April 1820, was put in. It was between General Wilford and the Governors of Chelsea Hospital. It recited that General Wilford had contracted for the sale of a part of his estate, called the Ranelagh property, to the Governors of Chelsea Hospital; and in this deed was a covenant that General Wilford should levy a fine, to complete

title of the Governors of the Hospital to the portion of his lands so purchased.

*Onslow*, Serjt., objected, that this deed was not evidence; for that this was not a case between the General and the Governors of the Hospital, therefore this deed was a mere *res inter alios*.

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**BEST, C. J.**—If the fine was clear, and free from ambiguity, this deed would not be evidence; but there is an ambiguity in this fine, for it speaks of twelve houses in Chelsea, and there were nineteen: it is therefore ambiguous and uncertain which twelve were meant; this must be explained: therefore I think this deed admissible in evidence.

*Onslow*, Serjt.—My Lord, in the case of *Lord Blaney* v. *Lord Mahon*, in Viner, it was held, that if a fine is levied of 20 acres of land in D., and the conusor have more, the conusee may elect which 20 he will have.

**BEST, C. J.**—I should like that case to be reconsidered: but I am clearly of opinion, that you cannot recover the whole of the property. If there be a patent ambiguity in a fine, it is void; but if the ambiguity be latent, you must go into evidence to explain it. The fine is for twelve houses; and if the General had had only twelve, I could have received no other evidence; and if the fine had even been obtained by fraud, that could not have been gone into in this case: the party must have gone into Equity, and even there, the fine would not have been set aside, but a re-conveyance would be ordered; and it is quite right it should be so, for if it were otherwise, it would shake the titles of a great many estates. There is no doubt, that if a party make a will, and afterwards levy a fine; that revokes the will as to all such estates as the fine extends to, though the party had no intention of revoking his will,

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**BULKLEY,**  
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and though he takes the same quantity of estate after the fine as he had before. On this evidence, I think it is plain that the fine was of the Ranelagh property only: so far, the will is revoked, and no further.

Verdict for the lessor of the plaintiff, for the Ranelagh property.

*Onslow and Pell, Serjts., and Reader,* for the lessor the plaintiff.

*Bosanquet and Taddy, Serjts.,* for the defendant.

[Attornies—*Ellis & V., and Few, A., & H.*]

*Adjourned Sittings after Easter Term, in London*

BEFORE LORD CHIEF JUSTICE BEST.

**TAYLOR and Another v. BOOTH.**

*Seemle,* that an averment in a declaration on a bill of exchange, drawn in Ireland, and made payable in England, treating the sum mentioned in the bill as Irish currency, and stating it to be of a certain value in lawful

**ACTION** on a bill of exchange, drawn in Ireland, and payable in England. The sum stated in the bill was 256*l.* 18*s.* sterling, for which sum the plaintiffs propose to take a verdict.

*Cross, Serjt.,* for the defendant, pointed out an averment in the declaration, which treated that sum as Irish currency and stated that it was of the value of 232*l.* 4*s.* of lawful money of Great Britain. He submitted, that the verdi

money of Great Britain, is material, and will prevent the plaintiff from recovering more than that sum; though, without such an averment, he would be entitled to treat the bill as for English currency. A bill drawn in Ireland for 256*l.* 18*s.* sterling, payable in England, will be taken to mean English money.

could not be taken for more than the smaller sum, the plaintiffs being bound by such averment. He also submitted, that, independently of the averment, the sum must be taken to be Irish currency, as it was drawn in Ireland, and stated to be for sterling.

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BOOTH.

BEST, C. J.—If a man draws a bill in Ireland upon England, and states that it is for sterling money, it must be taken to mean sterling in that part of the united kingdom where it is payable: common sense will tell us this. My only difficulty is on the declaration. If there is any case where it has been holden that such an averment as is made in this case is immaterial, I should be glad to be referred to it.

Parke, for the plaintiffs.—The rule in the case of *Brisson* and *Wright*, Douglas, 665, is, that if the plaintiff does not want the allegation at all, it may be struck out.

BEST, C. J.—I will take the verdict for the smaller sum, and you may move to enter it for the larger. My present opinion is, that you cannot get rid of this averment.

Verdict for the plaintiffs, for 232l. 4s. and interest.

Vaughan, Serjt., and Parke, for the plaintiffs.

Cross, Serjt., for the defendant.

[Attornies—*Freame & B.* and *Ellis & Co*]

To reduce Irish currency to its value in English money, you must deduct one-thirtieth of the sum in Irish currency, and the result

is the value in English money; and if to an amount in English money you add one-twelfth, it gives the value in Irish currency.

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## ALEXANDER v. BROWN.

A paper written by a party, is admissible in evidence against that party, though it is signed by a third person. If a person goes and offers a sum of money, stating how much he offers, and holding the money, twisted up in bank notes, in his hand, it is a sufficient tender; but if the sum had not been mentioned, *semble*, that it would not have been a good tender.

**DECLARATION** for goods sold and delivered to a person, at the defendant's request. Pleas—The goods were not delivered, and a tender of 29*l.* 19*s.* 8*d.*

For the defendant, a paper was offered in evidence which was in the hand-writing of the plaintiff, and signed by Neave, to whom the goods (which were bricks) were delivered, for the purpose of building a factory for the defendant.

*Taddy*, Serjt., for the plaintiff, objected to its being received. It is true this is written by my client, and signed by Neave. A clerk may write a paper, but it will not therefore fix him, because it is written for another. It may be called as a witness.

BEST, C. J.—I shall receive it, because it is written by your client. As yet, I do not know the contents: I desire it may be read, as, if he had said any thing, I shall hear it. The effect is another thing. It is new to me that what a man writes is not receivable.

*Taddy*, Serjt.—They offer it as an act done by Neave.

BEST, C. J.—I do not receive it as such, but as a paper written by your client.

The person who made the tender had two bank notes twisted up in his hand, inclosing four sovereigns and 19*s.* 8*d.* in change, making the precise sum intended to be paid. He told the plaintiff what it consisted of, but did not open it before him.

*Taddy*, Serjt., objected, that this was not sufficient.—  
He ought to have shown him the money.

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v.  
BROWN.

BEST, C. J.—I am of opinion that it is sufficient. If he had not mentioned the amount, I think it would not have done.

*Taddy*, Serjt., and *D. F. Jones*, for the plaintiff.

*Bosanquet*, Serjt., and *Moody*, for the defendant.

[Attornies—*G. Palmer* and *Nind & Co.*

### HARRINGTON v. FRY.

**ACTION** for goods supplied to the ship *Elizabeth*. The defendant, whose name is Samuel Fry, lived at Plymouth Dock; and a witness, named Welsford, who had the management of the vessel, put in two letters, stating that he believed that they came in answer to letters written by himself and sent to Samuel Fry, at Plymouth Dock. But he never saw Mr. Fry.

An attorney's clerk proved that he served process in this action on Samuel Fry, of James-street, Plymouth Dock; on which Fry said, "very well." The witness stated, that he knew most of the principal people there, and never heard of any other person named Fry. The defendant is a ship-owner.

It was then proposed to read the letters, as letters written by the defendant.

If a person sends letters to S. F., of Plymouth Dock, and receives answers to them; such answers are admissible in evidence against a defendant, his name being S. F., and it being proved by a person who knew the principal resident of Plymouth Dock, and knew of no other person named S. F.; this being considered sufficient *prima facie* evidence that

they came from him: and if they were not of his handwriting, it lay on him to show that. A person is not liable for goods supplied for the use of a ship; unless he either is owner, or has held himself out as such, or has made an express promise to pay, or has received profit from the ship.

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 FRY.

*Pell*, Serjt., for the defendant, objected.—There is no evidence of these letters being of the handwriting of Fry the defendant. Welsford merely proved his having written letters to a person named Fry. The plaintiff ought to have given notice to Fry to produce the letters sent to him; but he does not. He might have got witnesses to prove the handwriting of Fry; and there is no proof of acts done under this correspondence, and recognized by the writer of the letters.

*Wilde*, Serjt., and *Bayley*, on the same side.—These are not foreign letters. Here is a party called from Plymouth Dock to prove service of process. The plaintiff's counsel might have offered the best evidence, namely proof of the handwriting. It does not appear that an actual inquiry was made by the young man who served the process.

BEST, C. J.—I am clearly of opinion that these letters are admissible. It has been proved that the defendant is a ship-owner; and a witness has stated that he knows most of the principal people, and knows only one Samuel Fry among them. This I think is enough for me to presume that there is no other Samuel Fry of Plymouth Dock. I never knew notice to be given in such a case: the correspondence itself is not material. The witness Welsford says, these are the letters of a person corresponding under the name of Samuel Fry, of Plymouth Dock; and then it is proved, that there is only one person of the name there. It is open to the other side to prove that the letters are not of the handwriting of Samuel Fry, the defendant.

The letters were then read. They spoke of claims which the writer had on account of the vessel in question, and clearly showed that he considered himself as an owner.

Welsford gave the order for the goods, stating them

be for the owners generally, but not mentioning any names; and it did not appear that the plaintiff was at that time at all aware of the defendant's being an owner.

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v.  
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On account of a non-compliance with the registry acts, the bill of sale under which the defendant supposed he held his share of the ship, turned out to be a nullity. The defendant's name did not appear on the registry at London, the port to which the ship belonged at the time the goods were supplied; and there had been no registry at Exeter, the place where the ship was described as being registered, in the bill of sale.

*Pell, Serjt.*—I submit, that the defendant is entitled to a verdict. There is no evidence of any personal credit given to him by the plaintiff, and he is not the legal owner: a legal ownership can only be vested by a transfer in conformity with the register acts. And he cited *Trehella v. Rowe*, 11 East, 435.

*Kingham, Serjt.*, for the plaintiff.—The defendant believed himself to be the owner, and says so in his letters; he is therefore estopped from setting up the infirmity in his legal title.

*Barr, C. J.*—If a man appears to be the owner of a ship, though he is not the legal owner, he shall not shield himself against claims like the present, by the infirmity of his title. If it were possible for this ship to be registered at Exeter, and the defendant stood on such registry at Exeter, as the owner, I should hold him liable. But the case stands on different grounds; for if the party furnishing the goods had looked at the London registry, he would have seen that the name of the defendant was not in it. The conveyance at Exeter is of no avail. The defendant fancied himself the owner, but never held himself out as such to the plaintiff; nor does it appear that the plaintiff had any idea that he was owner. It appears,



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too, from the letters, that the defendant never received any of the profits of the vessel; for if he had, I should have held him liable, however defective his title. I agree with the defendant's counsel, that the defendant can only be liable in two ways—either as legal owner, or as holding himself out as such; and I am of opinion, upon the evidence, that he is not liable in either of these ways. I think the case of *Trewhella v. Rowe* distinct from this case. His lordship then directed a

Nonsuit, with liberty to move to enter a verdict for the plaintiff.

*Vaughan*, Serjt., and *E. Lawes*, for the plaintiff.

*Pell* and *Wilde*, Serjts., and *Bayley*, for the defendant.

[Attornies, *T. West*, and *Hughes & Co.*]

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In Trinity Term, *Vaughan*, Serjt., moved to enter a verdict, pursuant to the leave given at the trial. He argued, that there was a distinction between the proving the title to a ship, and the making out a charge against an owner. The only question being, whether these goods were furnished for the benefit, and on the authority of the party; if he acts as owner, and holds himself out as such it is enough, though he has neither a legal nor an equitable title, which he admitted the defendant could not have unless the requisites of the register acts were complied with. The general object of these acts was, merely to see that foreigners have not an improper interest in British ships. With respect to the bill of sale, all the register acts say, that such as this is shall be null and void. But if a man delivers over, for a sum of money, the possession of a vessel to another, without any reference to the register acts at all; he is liable, though he may not be able to make out a legal title. Fry gives to Web

ford an authority to order such stores and repairs as are necessary. The question is not on the point of legal ownership; but, whether the goods were furnished for the benefit, and on the authority of the defendant. And he cited the cases of *Sutton v. Buck*, 2 Taunton, 302; *Hubbard & Johnstone*, 3 Taunt. 177; and *M'Ivor v. Humble*, 16 East, 169.

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BEST, C. J.—A man can only be charged for goods furnished for his ship, either on the ground of the credit being given to him personally, or of his being the owner, or of his holding himself out as the owner. Now, in this case, it is impossible to say that the defendant ever held himself out as owner. Welsford proved, that the plaintiff never knew that the defendant was owner. The contract was with the owners generally, and not with any individual. Then, was the defendant an owner? It is clear, that he was not. The bill of sale gave no interest, because it stated the registry of the ship to be at Exeter, whereas it was not, but at London. But if the defendant had appeared, at Exeter or London, on the register as owner, I should have held him liable, though there was a defect in his title. The contract was with the owners, and the plaintiff, if he had gone to the Custom-House, would have seen that the defendant was not one of the owners. I am therefore clearly of opinion, that he is not liable. The credit was not personal; and the case in 11 East, is distinguishable from this.

PARK and BURROUGH, Js., concurred.

Rule refused.

By the statutes 26 G. 3, c. 66, and 34 G. 3, c. 68, all transfers of ships, and shares in ships, must be in writing; and such writing must set out a copy of the certificate of the ship's registry, otherwise such

transfer is not to be valid either in law or in equity. In the case of *Laroche v. Wakeman*, Peake, Rep. 140, it was ruled, that vessels employed in inland navigation are not within the register acts.

# OXFORD LENT CIRCUIT.

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BEFORE MR. JUSTICE PARK, & MR. BARON GARRICK

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## BERKSHIRE ASSIZES.

BEFORE MR. JUSTICE PARK.

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1824.

March 1st.

BLOXSOME v. WILLIAMS.

Whether in an action for a breach of warranty of a horse, the defendant can be allowed to set up that he was a horse-dealer, and sold the horse on a Sunday, contrary to the provisions of the statute of 29 Car. 2, c. 7. —*Quære.*

### ACTION on the warranty of a horse.

It appeared that the plaintiff was an attorney, the defendant a horse-dealer, and that the horse was bought of the defendant by the plaintiff's son, on a Sunday, and that the horse, being warranted sound by the defendant, was unsound.

*Jervis*, objected, that this action could not be maintained; because, the sale of the horse being on a Sunday and the defendant a horse-dealer, the sale was void, by the statute 29 Car. 2, c. 7, § 1, which enacts, that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work in their calling, works of necessity or charity excepted; and that in the case of *Drum v. Defontaine*, 1 Taunt, 131, the Court only held, that the sale of a horse on a Sunday was not void, because

appeared that, in selling it, the vender was not exercising his worldly calling, he not being a horse dealer.

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v.  
WILLIAMS.

**PARK, J.**—That was an action for the price of the horse. If the horse-dealer were suing for the price of the horse, the other party might say, you committed an offence by selling it on a Sunday, in the way of your calling, and the sale is void. The difficulty I feel is, whether a man can first do wrong by using his trade on a Sunday, and then take advantage of the wrong he has done, by annulling the sales if they don't suit him.

Verdict for the plaintiff, with liberty to move to enter a nonsuit.

*Taunton*, for the plaintiff.

*Jervis* and *Cross*, for the defendant.

[Attornies—*Bloxsome* and *Ward*.]

In Easter Term, *Jervis* moved for a rule nisi, to enter a nonsuit, which was granted.

## OXFORD ASSIZES.

BEFORE MR. BARON GARROW.

**WEAVER v. LLOYD.**

*March 5th.*

**THIS** was an action for a libel published in the *Oxford Herald*, imputing to the plaintiff that he had cruelly  
If a libel is justified as true, and in the plea each specific statement is averred to be true; if the defendant does not prove each statement to be true, the plea is not proved, though he prove facts of the same kind.

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WEAVER  
v.  
LLOYD.

beaten his horse, and knocked out one of its eyes. The defendant pleaded, 1st, the general issue; 2nd, a justification of the truth of *all* the things stated in the libel and, 3rd, another justification, which merely alleged that the statements of the libel were "*true in substance*" (a).

The manuscript of the libel was proved to be of the defendant's handwriting, and read.

A letter from the defendant to the editor of the Oxford Herald was read; it referred to another account of the beating of the horse, which had appeared in that paper.

The plaintiff's counsel wished to read the account so referred to from the Oxford Herald.—This was objected to

GARROW, B. held, that the account so referred to by the defendant in his letter was admissible in evidence.

It was read from the Oxford Herald.

Evidence was given on the part of the plaintiff, to show the falsehood of the statements of the libel, and on the part of the defendant, to show that the libel was a fair account of what occurred.

It was admitted on all hands that the statement, that the horse's eye was knocked out, was untrue; but that in other respects the libel was a fair account of what had occurred.

The jury found for the plaintiff, damages one farthing on the general issue; for the plaintiff on the first justification; and for the defendant on the second justification

(a) This justification, I apprehend, is not good. The case of *J. Anson v. Stuart*, 1 T. R. 748, decides, that if a libel charges the plaintiff with an offence, as that he is a swindler, it is not sufficient to plead that he is so; but the defendant must set forth the specific facts he means to prove, to show

that the plaintiff is so. And the case of *Holmes v. Catesby*, 1 Taun 548, decides, that a justification of a libel must state issuable fact and a justification of a libel, the terms of such libel, is not sufficient, if the libel only charges the plaintiff with general misconduct as an attorney, or the like.

In an action for a libel, if a letter of the defendant is read, which refers to an account of the transaction the libel relates to, which has appeared in a newspaper, that newspaper may be given in evidence.

*Jervis, Peake, Serjt. and Cross*, for the plaintiff.

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WEAVER  
v.  
LLOYD.

*Taunton, Russel, and Bicheno*, for the defendant.

[Attornies—*Frankum* and *Lloyd*.]

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COURT OF KING'S BENCH.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, AND  
LITTLEDALE, JS.—In Bank.

*Taunton* moved (with leave of the learned baron) to enter a verdict for the defendant on the first justification, on the ground that that plea was proved in substance; and though he admitted that the beating the horse's eye out was not proved, yet, as the general charge of the libel was cruelty to the horse, that was abundantly proved, though each specific fact of cruelty was not proved.

The Court were clearly of opinion, that if a libel charges specific facts of cruelty, and those statements are justified as true, each specific fact of cruelty must be proved, to support the justification.

Rule refused.

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WORCESTER ASSIZES.

BEFORE MR. JUSTICE PARK.

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REX v. CALEB TANDY.

March 8th.

**THIS** prisoner was indicted under the statute of 39 Eliz. c. 15, for breaking into a dwelling-house, no person being in the day-time (no person being therein,) it must be proved, that the breaking took place at a time of day when there was sufficient daylight to distinguish a person's features. To constitute the offence of breaking into a dwelling house

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 TANDY.

therein, and stealing goods, to the value of five shillings and more.

The prosecutor proved, that when he left his house to go to work, no person was in it, and that he left it securely fastened; when he returned, he discovered that it had been broken open, and goods stolen of more than 5s value; it was then so dark that a person could not distinguish a man's features.

PARK, J., laid down, that this offence was the converse of burglary, and that, to constitute the offence, it must be proved that the house was broken into at a time when there is light enough to distinguish a man's features.

Evidence was then given, to show that the prisoner was in possession of the stolen goods before dark.

Verdict.—Guilty.

~~—~~

March 8th.

REX v. GEORGE GRIFFITH.

To constitute the offence of cutting, with intent to murder, it is not necessary that the wound should be near a vital part, or of such a nature as to be likely to cause death.

**THIS** prisoner was indicted for cutting and stabbing Edward Penny, with intent to murder him: other counts charged it to be with intent to maim, disable, and disfigure him, and with intent to do him some grievous bodily harm.

Evidence having been given of the circumstances,—

*Godson* asked the surgeon who attended the prosecutor, whether the wound was near any vital part, or was of a dangerous nature, likely to cause death.

PARK, J.—I think that question quite superfluous; the

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 v.  
 GEORGE  
 GRIFFITH.

situation of the wound on this indictment is immaterial ; all that we can inquire is, whether the prisoner cut or stabbed the prosecutor with either of the intents laid in the indictment, and whether, if death had ensued, the offence would have been murder. I know, some judges have held, that to constitute this offence, the wound must be of such a nature as is likely to cause death. However, till the House of Lords have decided that that is law, I shall hold the contrary opinion.

From the other evidence it appeared, that, if death had ensued, the offence would only have amounted to manslaughter.

Verdict.—Not guilty.

The stat. 43 Geo. 3, c. 58, (Lord Ellenborough's act), enacts, that " if any person or persons shall wilfully, maliciously, and unlawfully, stab or cut any of his Majesty's subjects, with intent, in so doing, or by means thereof, to murder or rob, or to maim, disfigure, or disable such his Majesty's subject or subjects, or with intent to do some other grievous bodily harm to such his Majesty's subject or subjects, or to prevent apprehension; such persons are declared felons, without benefit of clergy. Provided always, that in case death had ensued, it would not have amounted to murder, the party stabbing or cutting shall be acquitted." The above is the clause in the statute, in which there is nothing which makes it necessary to show that the wound was near a vital part, or of a dangerous nature; but in practice I have known judges direct an acquittal where the wound has been of such a

kind, that it was quite impossible that it could cause death. The first case of this kind, that I remember, was at the Old Bailey, a few years ago, where, in a scuffle in the street, a watchman got his finger cut by a knife that the prisoner had in his hand. The judges held, that this was not within the act, as the wound was of such a nature, that death would not ensue from it. In another case, at the Worcester Spring Assizes, 1823, where, in an alehouse quarrel, the prisoner had cut the prosecutor with a knife; on the surgeon proving that the cut, which was inflicted over the prosecutor's ribs, was " not more than a man's " cutting himself in shaving," BEST, J. held, that the prisoner must be acquitted, on account of the utter insignificance of the injury. And in the case of *Rex v. Akenhead*, Holt, N. P. C. 469, the prisoner was indicted under this act, for cutting the prosecutor across



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REX

v.

GEORGE  
GRIFFITH.*Godson*, for the prosecution.*Curwood*, for the prisoner.[Attornies—*Godson* and ———.]

the shoulder in a sudden quarrel, *BAYLEY*, J. entertained doubts. The wound was not in a vital part, and had death ensued, it would only have been manslaughter. His lordship therefore directed an acquittal, *under all the circumstances*. But it ought to be observed, that the circumstance of the offence only amounting to manslaughter, in case death had ensued, was of itself sufficient ground for his lordship's direction. Other cases of the same kind, I believe, have occurred; but I take the law to be, that the wound being of a dangerous nature, is not essential to the offence; but that

it is often the strongest evidence of the intent to murder, or of the absence of such intent. In that it is most important, in the way that on an indictment for shooting with intent to murder it would be important to show that the prisoner shot in a way as made it clear that his intention was not to murder only to frighten the party. It very often happens, that prisoners indicted on this clause of *Ellenborough's* act are acquitted because the offence happened under such circumstances, that if death had ensued, it would have amounted to murder.

March 9th.

REX v. JOSEPH PERKES.

It is a sufficient breaking to constitute the crime of burglary, if the party breaks a pane of glass of a window, and puts his hand in for the purpose of opening the shutter, though he cannot succeed in doing so.

**THIS** prisoner was indicted for burglariously breaking and entering the dwelling-house of William Hemmings with intent to steal his goods.

It was proved, that the prisoner broke the glass of the windows, and put in his hand to open the shutter which he could not succeed in doing.

**PARK**, J., held this to be clearly a burglary.

Verdict—Guilty.

**Mr. Justice FOSTER**, speaking of burglarious entry, at page 108, of his work on the criminal law, lays down, that "if any part of

"the body be *within the*  
"hand or foot, this, at common  
"law, is sufficient." Put  
hook or other instrument in

STAFFORD ASSIZES.

BEFORE MR. BARON GARROW.

REX v. WILLIAM LLOYD.

March 13th.

**THIS** prisoner was indicted for manslaughter.

The indictment stated, that the deceased being in a coal pit, and the prisoner well knowing that a certain windlass, at the top of the pit, required a considerable number of men to work it; and that the prisoner "*did compel and force, A. B. and C. D. who were working at the said windlass, to leave the said windlass, and, by such compulsion and force,*" the said A. B. and C. D. were obliged to desist from working at it, by means of which, a bucket,

An indictment for manslaughter, charging, that the prisoner "*did compel and force A. B. and C. D. who were working at a certain windlass, to leave the said windlass, and by such compulsion and force, &c. the*

deceased was killed; is not supported by evidence, that the prisoner was working the windlass with A. B. & C. D.; and that by his going away they were not strong enough to work it, and so they let it go: because the words "*compel and force,*" must be taken to mean active force.

house, to reach the goods in a house, has been held a sufficient entry. But in *Hughes's* case, 1 Leach, 406, where the prisoner had bored a hole in a door with a centre-bit, and some of the borings had fallen on the inside, from which it was wished to be inferred that the point of the centrebit had been within the house; it was held that this was not a sufficient entry to constitute a burglary. In *Roberts', alias Chambers',* case, 2 Ea. P. C. 487, where a glass window was broken, and the window opened with the head, but the inside shutters were not broken; it was ruled by WARD, C. B., POWIS & TRACY,

Js. and the Recorder, to be a burglary; but they thought this the extremity of the law: and, on a subsequent conference, HOLT, C. J., and POWER, J., doubting, and inclining to another opinion, no judgment was given. I have been informed, that within these few years, a similar case being tried before DALLAS, C. J., his lordship held, that it was not a burglary; because the breaking the window was only with intent to open the shutter, and not with intent to steal any thing. It seems however, pretty clear, that though the intent was to open the shutter, yet the prisoner had also the intent to rob the house.

1834

March 14th.

REX v. THOMAS GNOSIL.

To constitute the crime of highway robbery, the force used, must be force with intent to overpower the party, and prevent his resistance; and if the force used is not with that intent, but only to get possession of the property, it is not highway robbery.

**THIS** prisoner was indicted for a highway robbery. The prosecutor proved, that as he was going along street of Walsal, the prisoner laid hold of his chain, and, with considerable force, jerked his from his pocket; a scuffle then ensued, and the prisoner was secured.

**GARROW, B.**—The mere act of taking, being force, will not make this offence a highway robbery: to constitute the crime of highway robbery, the force used, must be either before, or at the time of the taking, and must be of such a nature, as to shew that it was intended to overpower the party robbed, and prevent his resisting, and not only to get possession of the property stolen. Thus, if a man walking after a woman in the street, were by violence to pull her shawl from her shoulders, though he might use considerable violence, it would not, in my opinion, be highway robbery; because the violence was not for the purpose of overpowering the party robbed, but only to get possession of the property.

**Verdict.**—Guilty of larceny of

ought to join in bringing actions, though some have not proved the will, or have even refused to act. But if, suing as executors, one only brings the action, and the others do not join, it can only be taken advantage of by plea in abatement, after oyer of the letters of administration. An executor may sue as such on contracts made with him as executor; and, indeed, in all cases, where the money recovered

would be assets. It is often tant for a person to sue as executor, because, if unsuccessful, he pays no costs. In actions of debt, by executors, or administrators, suing as such, if the defendant pleads the general issue, this plea admits that the parties are executors, or administrators, as stated in the declaration, and the defendant will not be allowed to dispute it.

*Male*, for the prosecution.

*Curwood*, for the prisoner.

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 GIBBIL.

[Attornies—*Wilson and Jones.*]

To constitute the crime of robbery, either the party must be put in fear, or the taking must be by violence, and it therefore becomes necessary to inquire what degree of force is necessary to constitute this offence. The sudden snatching of property from a person, is not a robbery, if there be no resistance or struggle, and no injury done to the party robbed. In *Seward's* case, 2 East, P. C. 702, the prisoner had pulled off a gentleman's hat and wig, in the street; this was held not to be a robbery; and in *Plunket Horner's* case, O. B. 1790, 2 East, P. C. 703, where the prisoner had snatched the prosecutrix's umbrella out of her hand, as she walked along the street, BULLER, J. and THOMSON, B. said, that it had been held, by very high authority at the Old Bailey, about 30 years before, that snatching any thing, unawares, from a person, constituted a robbery; but the law was now settled, that unless there were some struggle to keep it, and it were forced from the hand of the owner, it was not so; and they said, that this species of larceny seemed to form a middle case, between stealing privately from the person, and taking by force and violence. But

where there has been a struggle by the owner to keep the property, and the thief gets it, this will be a robbery. This was held in the case of *Davies, alias Beard*, 2 East, P. C. 709, where the prisoner snatched at the prosecutor's sword, and, *after a struggle*, succeeded in stealing it. This was held to be a robbery. And if there be any injury done to the party robbed, this will be sufficient force to constitute the offence of robbery. In *James Lapier's* case, 2 Ea. P. C. 708, the prisoner had torn the ear-ring of Mrs. Hobart from her ear, as she came out of the Opera-House, and, in so doing, her ear was torn: this was held to be robbery. And in *Morres' case*, 1 Leach, 335, where the prisoner had taken a diamond pin, which was strongly fastened in her hair, and, in so doing, tore away a part of her hair; it was held to be robbery. It has been long settled, that the putting in fear, or force, must take place, before, or at the time of taking, and not after the taking. The prisoner, on an indictment for robbery, may be acquitted of the capital part of the charge, and found guilty of simple larceny. *Rex v. Francis*, 2 East, P. C. 784.

1824.

March 14th.

REX v. THOMAS DAVIS.

If a person shoots at another who is endeavouring to apprehend him, he may be convicted on the usual indictment for shooting with intent to murder; though shooting with intent to prevent apprehending, is also a distinct capital offence, under Lord Ellenborough's act.

**THIS** prisoner was indicted for shooting at Samuel Bott, with intent to murder, disable, or do him some grievous bodily harm.

The prosecutor, a gamekeeper, hearing a gun fire in the night, in a wood of his employer, went out to apprehend the party who fired it; he found the prisoner in the wood, who ran away, and on the prosecutor pursuing him, the prisoner fired at, and wounded him.

*Ludlow*, for the prisoner, objected, that by the 43 Geo. 3. c. 58, (Lord Ellenborough's Act) it was a capital offence to shoot at a person with intent to murder him; and it was a distinct offence to shoot at a person to prevent his apprehending the person shooting: here the one offence was charged, and the other proved.

**GARROW, B.**—Though it is an offence to shoot at a person having authority to apprehend another, to prevent his so doing, the only question to be tried here, is, whether the prisoner shot at the prosecutor with intent to murder, or disable, or do him some grievous bodily harm; if he did, he must be convicted on this indictment; however, he may, or may not, be also guilty under another clause of the act.

Verdict—Guilty.

*Male*, for the prosecution.

*Ludlow*, for the prisoner.

SHROPSHIRE ASSIZES.

BEFORE MR. BARON GARROW.

WATSON & Another v. MURREL.

March 17th.

**ASSUMPSIT.**

The plaintiffs and the defendant were all attorneys; an indictment had been preferred against the parish of Ellesmere, for not repairing a road. On the part of the parish, it was wished, that the prosecutor should consent to the recognizances entered into on the part of the parish being respited. The plaintiffs were attorneys for the prosecutor, and the defendant attorney for the parish; a memorandum was signed by the plaintiffs and the defendant; it stated—"Messrs. Watson & Harper, attorneys for the prosecutor, agree that the recognizances shall be respited; and Mr. Murrel, on the part of the parish of Ellesmere, agrees to pay the costs; it being agreed, that Mr. Cooper shall tax the costs." Mr. Cooper proved that he had done so.

If the attorneys on both sides, on an indictment against a parish for not repairing a road, enter into an agreement, in which one "agrees, on the part of the parish, to pay the costs," this agreement is personally binding on the attorney; and if it is agreed that A. B. shall tax the costs, it is no answer to an action for the costs, that the defendant had no notice to attend the taxation; if he did not object to that, when he was first apprized of the taxation having taken place in his absence.

Peake, Serjt. objected, that no action could be brought against the defendant; he merely agreed, on the part of the parish, and the parish only were liable; and that no notice to attend the taxation had been served on his client, and therefore, such a taxation could not be binding on him.

GARROW, B.—I have no doubt, that in point of law, this is a personal engagement (a); but you may move to enter a nonsuit, on the second point.

Verdict for the plaintiffs.

(a) In the case of *Appleton v. Binks*, 5 East, 148, the plaintiff declared on a covenant between himself and the defendant, who was described in the covenant, as "T. Binks, of, &c. for, and on

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WATSON  
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v.  
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*Taunton and Campbell*, for the plaintiff.

*Peake*, Serjt. and *Russel*, for the defendant.

[Attornies—*Watson & Harper* and *Murrel*.]

### COURT OF KING'S BENCH.

BEFORE ABBOT, C. J., BAYLEY, HOLROYD, AND LITTLED.  
In Bank.

May 5th.

*Russel* now moved to enter a nonsuit, on the ground that no notice of taxation had been given.

BAYLEY, J.—Did the defendant ever ask to have the taxation reviewed, or did he make any complaint that the money was demanded.

*Russel*.—That does not appear, my lord.

ABBOTT, C. J.—Taxation is a condition precedent to the absence of one of the parties at the taxation. If notice must be objected to at once, and not be delayed till an action is brought,

The other judges concurred.

Rule refused.

“the part and behalf of the  
“ Right Honourable Lord Vis-  
“ count Rokeby;” it was sealed  
with the seal of the defendant,  
and it stated, if the plaintiff would  
convey a certain estate to Lord  
Rokeby, the defendant, “for him-  
“ self, his heirs, executors, &c.” on  
the part and behalf of the said Lord  
Viscount Rokeby, did covenant,  
that the said Lord Viscount Roke-  
by, his heirs, &c. would pay to the  
plaintiff 6000*l*. The declaration  
went on to state notice to Lord

Rokeby, and his refusal to  
money. To this declaration  
was a general demurrer,  
Court held, that the  
being by the defendant,  
own name, “for him-  
“ heirs, &c.” and sealed  
own seal, he was personal  
by it. In the case of *1*  
*Back*, 2 East, 142, the Court  
that the proper way, when  
executes a deed as attorney  
another, is for him to sign  
for C. D., or, for C. D. A

BEFORE MR. BARON GARROW.

WALMISLEY v. ABBOT.

March 18th.

**THIS** was an action, brought by the plaintiff, a surgeon and apothecary, for the amount of his bill.

To shew that the plaintiff had passed his examinations, at Apothecaries' Hall, under the statute, 55 Geo. 3, c. 194, a witness produced the certificate of the plaintiff's examination at that place; and proved, that the signature of Mr. Simmons was of his handwriting, and that he acts as an examiner at Apothecaries' Hall; and that the certificate produced, was the usual certificate given to persons who had passed their examinations.

To prove that a person has passed his examinations at Apothecaries' Hall, under the stat. 55 Geo. 3, c. 194, it is sufficient to produce the certificate of examination and fitness (which is given to every one who is approved by the examiners), and prove the signature of one of the examiners to it. By the stat. 55 Geo 3, c. 194, no apothecary can recover his charges in a Court of law, *unless he prove at the trial*, that he was in practice prior to, or on the 15th of August, 1815, or has obtained a certificate to practise, from the Apothecaries' Company.

The defendant's counsel objected, that the signatures of all the examiners ought to be proved, or some one called, who was present at the examination.

GARROW, B.—If it is proved that this is the usual form of certificate, and there is proof of the handwriting of any one of the examiners, and proof that that person acts as an examiner, I shall admit the certificate as evidence that the plaintiff has duly passed his examinations.

The items were proved in the usual way.

Verdict for the plaintiff.

In Easter Term, a new trial was moved for, in this case. The Court said, that as the decision would affect other cases, they would grant a rule *nisi*.

By the statute 55 Geo. 3, c. 194, thecary shall be allowed to recover any charges claimed by him; and it is enacted, that "No apo-



1824

BEFORE MR. JUSTICE PARK.

March 22d.

REX v. RICHARD BEACALL.

Embezzlement  
Pleading.

**THIS** prisoner was indicted for embezzlement, the stat. 39 Geo. 3, c. 85.

There were seven indictments against him, for di embezzlements.

By a private act of parliament, the poor of the p in Stréwsbury and its suburbs, were united, and i sons, being owners of houses, &c. of the value of year, were appointed guardians of the poor, and we stituted a corporation, under the name of "The Gu " of the poor of parishes in and near the to

in any Court of law, *unless such apothecary shall prove, on the trial, that he was in practice as an apothecary prior to or on the 15th of August, 1815, or that he has obtained a certificate to practise as an apothecary, from the Master, Wardens, and Society of Apothecaries.*" It should be observed, that the section of that act which inflicts a penalty on persons practising without a certificate, makes it necessary for persons to prove, to exempt themselves from the penalty, that they were in practice on the 15th of August, 1815; and a practising before that day, is not sufficient to exempt the party from the penalty: *Apothecaries' Company v. Roby*, 1 Dow.

& Ry. 564, though it is suf an action for the recovery of thecary's bill. And the *ca Apothecaries' Company v. ton*, 3 B. & A. 40, decides, mere administering of is not enough, by itself, t the conclusion, that th practised as an apothec if evidence is given, that fendant could not read tions, and did not kn weights and measures i apothecaries, it is cog dence, from which a j presume, that he did not as an apothecary. See of *Brown v. Robinson* page 264.

“Shrewsbury, in the county of Salop;” and were to have perpetual succession, and a common seal; by another section of this act, 12 directors were to be appointed, who were to manage the concerns of the poor, and of the house of industry. They were to be called, “The directors of the poor of parishes in and near the town of Shrewsbury, in the county of Salop:” (but they were not constituted a corporation). In these directors, the property of all goods, chattels, furniture in the house of industry, clothing, and debts due to the corporation, were vested: they were also empowered to appoint a proper person to be steward to the corporation, and another fit person to be clerk to the corporation.

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 Rex  
 v.  
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 BEACALL.

The indictment on which the prisoner was tried stated, that he being employed in the capacity of a *Steward to the Directors of the Poor* of Parishes in and near the town of Shrewsbury, in the county of Salop, and as such steward, entrusted by the said directors to receive money, &c.; and being so employed, did, by virtue of such employment, receive fifteen promissory notes, for the payment of fifteen pounds (the several sums of money secured, &c. being due and unsatisfied), *for and on account of the directors, his employers*, and that he did on, &c. feloniously embezzle and steal the said promissory notes from the said directors, his masters and employers, to whose use he received the same, being at the time of committing the said felony *the property of the said directors*, against the form of the statute, &c.

The second count was similar, except that it stated him to be clerk to the directors.

The third count stated him to be a servant of the directors.

The fourth count was for a larceny at common law.

A witness proved, that the prisoner acted as steward at the steward's office, in the house of industry, and had also acted as such at several meetings of the directors.

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Rex

v.

RICHARD  
BEACALL.

**1st Objection.**  
If a person receives money as steward of another, proof of that is sufficient evidence of his being steward to support an indictment for embezzling that money.

*Curwood* objected, that his appointment as steward would, if produced, be the best evidence of what capacity he filled.

PARK, J.—If it is proved that he received the money embezzled as steward, that is sufficient.

A witness proved, that he being the reputed father of a bastard child, had agreed with the directors to pay them 80*l.* by two instalments, for them to be at the expense of maintaining the child: he proved paying 15*l.* to the prisoner, as the steward, a part of which was 1*l.* notes of the Shrewsbury bank.

**2nd Objection.**  
A steward who receives money for his employer, which his employer would be guilty of an illegal act in receiving, and such money is kept by the steward, and never reaches the master's hands: Whether this is embezzling of the money of the master—  
Quære.

*Curwood* objected, that these payments in the lump for bastard children being illegal, the present payment was not of any money that the directors could be entitled to and therefore the prisoner could only have deprived them of what they would have been guilty of an illegal act in receiving; and as it never, in fact, came to their hands the money was never their property.

PARK, J.—I shall not decide on this objection at present. Let the case proceed, and I shall hear all the objections.

Another witness proved, that when the prisoner was sent for by the directors, they told him there were several sums of money received by him and not accounted for; among the rest the sum mentioned in the indictment. The prisoner acknowledged that he had appropriated the money to his own use, being much pressed for money at the time; he therefore owed them that sum, which he would repay them. They would not, however, consent to receive it.

**3rd Objection.**  
If the steward, when told by his employer, that he has his money in his hands, admits he had used the money, but offers to pay it over, and the master will not receive it—will an indictment for embezzlement lie?

*Curwood* objected, that this was not in law an embezzlement.

element, admitting that the steward says to his principal, I have got so much of your money in my hands, and I will pay it over to you; that is no embezzlement.

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 v.  
 RICHARD  
 BEACALL.

This being the case for the prosecution,—

*Curwood* objected, that, by the act of parliament, the steward was steward to the corporation of guardians, and not steward to the directors; and, therefore, if a man, being servant to one body, receives the money of another body, and does not account for it, not being the servant of the body whose money he appropriates to his own use, he is not guilty of the crime of embezzlement: and, besides, he was stated in every count but the last (which was for a larceny) to be, in some capacity or other, a servant of the directors, which was not proved, and was even contrary to the fact.

**4th Objection.**  
 Whether a servant of one body, receiving money for another body, and appropriating it to his own use, is guilty of embezzlement—  
 Quære.

His next objection was, that, by the act, the property of all goods, chattels, furniture, clothing, and debts due to the corporation, was vested in the directors; but money, and securities for money, not being so vested by the act, the property in them remained either in the guardians or in the parish officers of the parish, to which the money would have been due. No count of the present indictment laid the property either in the guardians, or in the parish officers. Therefore the property was laid in the wrong persons.

**5th Objection.**  
 Whether, if an act of parliament vests the property of "goods, chattels, furniture, clothing, and debts," in certain persons, the property of money, and securities for money be in them:—  
 Quære.

His next objection was, that the notes were laid to be the property of "the directors of the poor, &c." No body of persons, except they are a corporation aggregate, can have property by a joint name. The directors were not a corporate body; therefore, the property ought to have been laid, if it belonged to them at all, as the property of A.B. C.D. &c.

**6th Objection.**  
 If an act of parliament enacts that certain persons shall be called "directors of the poor, &c." quære, whether, in an indictment, property may be laid in them

by the name of the "directors of the poor, &c." they not being a corporation aggregate.

His next objection was, it was charged, that the prisoner, being steward, received fifteen one pound notes, embezzlement, it is necessary to state from whom the money embezzled was received—

**7th Objection.**  
 Whether, in indictments for

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 BEACALL.

and embezzled them. The indictment did not state from whom he received the notes. This, he contended, was a fatal omission: he believed, that in all the indictments for embezzlement, tried in London and Middlesex, the name of the person from whom the money embezzled was received was always stated; and if there was ever a case in which it was peculiarly necessary to state that, it was the present. Here the steward received sums of money daily and he is charged with receiving fifteen one pound notes and embezzling them: how could he know how to make his defence, what witnesses could he call to shew that he had not received them, or that he had paid them over? Besides, the prosecutors were not limited to the day mentioned in the indictment; they might bring evidence to support a charge of embezzlement on any other day; the only thing that could give the prisoner an idea what charge he had to meet, was by the indictment stating from whom the money embezzled was received. And, further, if this objection were not valid, how could the prisoner plead *autrefois acquit* to an indictment similarly framed for the same offence? There would be nothing to show whether it was the same sum of money, or a different set of one pound notes received from another person. With regard to the fourth count, no felonious taking had been proved.

It was admitted by the counsel for the prosecution, that all the other indictments were open to the same objections.

PARK, J.—The objections are, some of them, so important, that I shall reserve them for the opinion of the twelve judges.

Verdict—Guilty.

*Bather* and *Russel*, for the prosecution.

*Curwood*, for the prisoner.

[Attornies—*Cooper* and *Harper*.]

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REX v. GEORGE WELLINGS.

March 22.

**THIS** prisoner was indicted for embezzlement.

There were five indictments against him.

He was clerk to the Guardians of the Poor, appointed under the private act of Parliament, mentioned in the last case (*Rex v. Richard Beacall*), the indictments were all framed as in that case. In each, the first count stated him to be clerk *to the Directors* of the Poor. The second count stated him to be a servant to the directors: and the third count was for a larceny.

If a clerk receive money for his master (it being no part of his employment to receive money) and appropriate it to his own use: Whether this is in law an embezzlement—  
Quære.

The evidence against him was, that a person paid an annual sum for the maintenance of one of his relations in the house of industry. This sum was received by the prisoner, and when charged with having appropriated it to his own use, he acknowledged having done so; but he offered to repay the money, but the directors would not accept it.

The prisoner's counsel called for the production of the book in which the proceedings of the directors at their meetings were entered.

From this it appeared that the prisoner had been appointed clerk *to the corporation*.

The prisoner's counsel contended, that the directors claiming a balance, and the prisoner's offer of repayment when the deficit was mentioned to him, were circumstances to show a mere civil debt, and not a felony; and that the *clerk of the corporation* (which the prisoner was proved to be), appropriating to his own use the money of *the directors*, was not in law guilty of an embezzlement.

They next contended that it was not the duty of the clerk to receive money, that being the duty of the stew-

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ard; therefore, if he misapplied money paid to him, he did not receive it as clerk, or by virtue of his employment.

The prisoner's counsel then repeated the 5th, 6th, and 7th objections made in the case of *Rex v. Richard Beacall*, (*ante*, page 310).

PARK, J. reserved all the objections for the opinion of the twelve Judges.

Verdict—Guilty.

Bather and *Russel*, for the prosecution.

Curwood and *Carrington*, for the prisoner.

[Attornies—*Cooper* and *Nock*.]

The opinions of the twelve Judges in this case, and in the case of *Rex v. Richard Beacall*, *ante*, p. 310, have not yet been made public.

HEREFORD ASSIZES.

BEFORE MR. JUSTICE PARK.

March 24th.

APPERLEY, Clerk, v. GILL.

In an action by a Vicar, for not setting out pre-dial tithes, proof of a single payment to him, or any of his predecessors, of that species of tithe, is evi-

dence to go to the jury, that the vicars of that place are endowed with that species of tithe.

THIS was an action of debt, brought by the plaintiff who was vicar of Oaklepitcher, against the defendant, for the treble value of the tithe of corn grown on the defendant's lands within that parish.

A witness, who was servant of the vicar, proved that the plaintiff acted as vicar of the parish; and that the de-

defendant had reaped a quantity of corn in the parish; and that the witness knew of no tithe being set out by the defendant.

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 v.
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Campbell objected, that there was no proof that the vicars of Oaklepitcher were endowed with the tithe of corn.

A witness was then called, who stated that he had paid £28 to the plaintiff, in lieu of the great and small tithes of one of the farms the defendant had since occupied.

Campbell objected, that though this proved that the vicars were endowed of the whole of the tithes of one farm, it did not prove them endowed with the corn tithe of all the farms; as nothing was more common than for a vicar to be endowed with the whole of the tithes of one farm (the manor farm, for instance), while he has only some of the tithes on the other farms.

PARK, J.—The receipt by a vicar of a particular species of tithe from any farm, is evidence to go to the jury, that he is endowed with that species of tithe.

The defence was, that the plaintiff had simoniacally bought the living.

To prove this, the Rev. Archdeacon Lilly, the patron of it, was called; but he wholly denied it.

Verdict for the plaintiff.

A practice has prevailed of late, where the attorney for the plaintiff thinks his case very clear, and that there is a good chance of getting judgment by default, of bringing actions of debt, for goods sold,

money lent, work and labour, and other simple contract debts: and by bringing the action in debt, instead of assumpsit, if judgment goes by default, the plaintiff may have final judgment without a writ

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Clerk,
v.
GILL.

Taunton and Russel, for the plaintiff.

Campbell, for the defendant.

[Attornies ———.]

of inquiry. This is certainly, so far, an advantage; but, at the same time, there is some risk of the defendant's waging his law, &c and if the defendant puts a wager of law upon the record (of which there are forms in 3 Chitty on Pleading, Lilly's Entries, Coke's Entries, and Ashton's Entries), a day is given to the defendant by the Court, to "come and make his law;" and if he comes to the bar of the court, and makes oath, that he does not owe the money, or any penny thereof, and he brings eleven persons (*of his own choosing*) with him, who swear that they believe what he says, the Court will order judgment to be entered for him; and *the plaintiff is not permitted to go into any proof in support of his case.* The whole form of waging law is given in 2 Salk. 682; where it appears, that the plaintiff's Counsel asked the Court not to receive the defendant's wager of law; but Holt, C. J., said, "we can admonish him: but if he will stand by his law, we cannot hinder it; seeing it is a method the law allows." The defendant came, as did his compurgators; and he took his place at the right corner of the bar, without the bar; and the Secondary asked him if he was ready to wage his law, and on his answering in the affirmative, the Court admo-

nished him and his compurgators which, says the Report, regarded not so much as to get from it. And the defendant laid his hand on the book, and that he did not owe the money *modo et forma*, or any part thereof; and the compurgators laid their hands on the book and swore that they believed what the defendant swore, was true to the defendant had judgment in his favour. I am not aware in any later case, the defendant and his compurgators have so far as to make this oath have been informed, that years since, in an action for goods sold, the defendant laid a wager of law upon the record but that the plaintiff's counsel though he had a clear case against him, fearing that the defendant would swear him out of the action, very prudently promised the action by a writ of debt without the wager of law. Wager of law is not allowed in debt on bond or other specialty in debt for rent, or for non-payment of predial tithes, or on a writ of debt for penalties given by parliament. It appears, from older Reports, that wager of law was by no means so common formerly as it is now. In several cases of wager of law in the Reports of Croke, Leach

GLOUCESTER ASSIZES.

BEFORE MR. BARON GARROW.

REX v. JOHN SCULLY.

April 2nd.

THIS prisoner was indicted for manslaughter, in shooting a man whose name was unknown.

It was proved that the prisoner had been set to watch his master's premises, and that he came to a constable to surrender himself. He said he had unfortunately shot a man; and that he having seen the man on his master's garden wall in the night, hailed him; and the man said to another, whom the prisoner could not see, "Tom, why don't you fire?" That he (the prisoner) hailed them again, and the same person said, "Shoot and be damned," whereupon he fired at the legs of the man on the wall, whom he missed, and shot the deceased, whom he had not seen from his being behind the wall.

This confession was the only evidence against the prisoner; but it was proved, that when the deceased was found, he had three dead fowls and a housebreaker's crowbar lying near him, and a flint, steel, and matches in his pocket.

A person set to watch a yard or garden, is not justified in shooting any one who comes into it in the night, even if he should see the party go into his master's hen-roost. But if from the conduct of the party, he has fair ground for believing his own life in actual and immediate danger, he is justified in shooting him.

GARROW, B.—Any person set by his master to watch a garden or yard, is not at all justified in shooting at or injuring in any way, persons who may come into those premises, even in the night; and if he saw them go into his master's hen-roost, he would still not be justified in shooting them. He ought first to see if he could not take measures for their apprehension. But here the life of the prisoner was threatened, and if he considered his life in

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JOHN SCULLY

actual danger, he was justified in shooting the deceased as he had done; but if, not considering his own life in danger, he rashly shot this man, who was only a trespasser, he would be guilty of manslaughter.

Verdict—Not Guilty.

Justice, for the prosecution.

Carrington, for the prisoner.

[Attornies—*Hinton* and *Russel*.]

April 2nd.

• REX v. WILLIAM WALKER.

If a person is driving a cart at an unusually rapid pace, and drives over another, and kills him, he is guilty of manslaughter, tho' he called to the deceased to get out of the way, and he might have done so if he had not been drunk.

THIS prisoner was indicted for manslaughter, in killing Thomas Crates.

The deceased was walking along the road leading from Bristol to Bitton, in a state of intoxication. The prisoner was driving a cart drawn by two horses without reins the horses were cantering, and the prisoner sitting in front of the cart. On seeing the deceased, he called to him twice to get out of the way, but from the state he was in and the rapid pace of the horses, he could not do so and one of the cart wheels passed over him, and he was killed.

GARROW, B. laid down, that if a man drive a cart at an unusually rapid pace, whereby a person is killed, though he calls repeatedly to such person to get out of the way if from the rapidity of the driving, or any other cause, the person cannot get out of the way time enough, but is killed, the driver is in law guilty of manslaughter; and that it is the duty of every man who drives any carriage, to

Give it with such care and caution as to prevent, as far as in his power, any accident or injury that may occur.

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Verdict—Guilty.

Carrington, for the prosecution.

Philpots, for the prisoner.

[Attornies—*Hinton* and *Chadborn*.]

(*Civil Side*.)

BEFORE MR. JUSTICE PARK.

REX v. JAMES STAMP SUTTON COOKE, and JENKINSON.

April 3rd.

THESE defendants were tried on an indictment which charged them with a conspiracy to disturb Sir George Jennings, Bart. in the peaceable possession of his estates. The indictment had been removed by *certiorari*.

Practice.
 If two defendants are indicted for a conspiracy, the Judge will, under certain circumstances, permit one of the defendants, who conducts his own case, to cross-examine before the counsel for the other defendant, and after the conclusion of the prosecutor's case, to address the jury and opens his case.

Campbell appeared as counsel for the defendant Jenkinson, and the defendant Cooke conducted his case in person.

On the application of *Campbell*—

PARK, J. permitted the defendant Cooke to cross-examine before *Campbell*, and to address the jury and

call his witnesses, before the counsel for the other defendant

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call his witnesses, before Campbell entered at all on defence of Jenkinson (a).

A witness who was called by the defendant C stated, before he was examined, that at the time he served with the subpoena, no money was paid him therefore asked that the judge would order the defence Cooke to pay his expenses before he was examined.

A witness who is subpoenaed by a defendant indicted for a conspiracy, is compellable to give evidence, though such defendant refuses to pay his expenses; and the indictment been removed by *certiorari*, and coming down to the assizes as a civil record, does not make any difference as to this.

PARK, J. (having consulted with GARROW, B.) said brother GARROW and myself are of opinion, that I have no authority in a criminal case, to order a defendant

(a) The usual course, where several defendants appear by separate counsel, is, for the senior counsel, employed on that side of the question, to cross-examine, and address the jury first, whichever defendant he may be employed by; and as soon as he has concluded his address to the jury, for the counsel for the other defendants to address the jury in succession; and, after them, such defendants as conduct their cases in person: and then for the counsel who first addressed the jury, to examine his witnesses; and then the witnesses for the others to be called: and, in conclusion, for the prosecutor's counsel to reply. This rule, however, I have known to be departed from; for, in an excise prosecution for a riot, tried at Gloucester, before ABBOTT, C. J., where there were eight separate defences, his Lordship, on account of the special circumstances of the case, al-

lowed each counsel to examine his witnesses, immediately after his address to the jury, and the defence of any other of the defendants was entered in the indictment. In the case of *Rex v. Henry Hunt & Others*, who had been found guilty of a conspiracy, the defendant Hunt (none of the counsel) wished to adduce evidence in mitigation of punishment, after the other defendants had done so; but the Court ordered that they must speak in the order in which they were named in the indictment.

pay a witness his expenses, though he has been subpoenaed by such defendant; and we are also of opinion, that the case is not altered by the indictment having been removed by *certiorari*, and coming here as a civil record (b).

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The witness was examined without being paid.

Verdict—Cooke, Guilty; Jenkinson, Not Guilty,

Taunton and Russel, for the prosecution.

Campbell, for the defendant Jenkinson.

[Attornies—Hanrot & M. and Orchard.]

REX v. YEATES.

April 5.

THIS was an information in nature of a *quo warranto*, calling on the defendant to show by what authority he exercised the office of a burgess of the town of Monmouth.

Practice.
 On the trial of *quo warranto* informations, if the affirmative of the issues is on the defendant, he begins; but if it is on the relator, he does.

The defendant pleaded several pleas, and the relator replied specially.

Denman, Common Serjeant, for the defendant, contended, that he ought to begin, as the defendant was called upon to show by what authority he exercised the office.

(b) Whether a witness is liable to an attachment for disobedience of a subpoena in a criminal case, if he does not go to the trial, because his expenses were refused

him when the subpoena was served, has never been decided; but the better opinion seems to be, that he is bound to obey the writ, though his expenses are refused.

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He ought to show his authority for so doing, and then the relator might impeach his title to the office if he could.

Taunton, contra.—The relator ought to begin, as he objects to the defendant's right to hold the office.

PARK, J.—I believe the point is new. As the affirmative of the issue is on the defendant, he must begin; but if on the pleadings, the affirmative had been on the relator, he must have begun.

Denman, Common Serjt. for the defendant.

Taunton, for the plaintiff.

[Attornies—*Tyler* and *Philpots*.]

In cases of this sort, it is often a great object to determine which side shall begin; because, if it is quite certain that both parties must call witnesses: the party that begins has the reply.

April 5th.

WHITE and Another, Assignees of SYMS, v. GAINER.

A person having a lien upon goods, does not waive that lien by the mere fact of his omitting to say that he claims the goods in that right, when they are demanded. Nor is it sufficient evidence of a waiver of his lien that he

TROVER for cloth. Plea—Not guilty, except as to 135 yards; as to which judgment went by default.

The defendant was a dyer, and, as such, had a lien on all the cloth but the 135 yards; but it appeared, that the bankrupt, after act of bankruptcy, and after a knowledge by the defendant of his insolvency, sold the whole of the cloth, as well that covered by the lien, as the residue; but when a demand was made of the whole of it, the defendant merely said he would not give it up; but did not, if he bought these goods with others, and also refuses to deliver up the other goods, though he has no lien on them; the sale of both sets of goods being void.

terms, say whether he meant to insist on the purchase or on the lien.

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& Another,
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v.
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Taunton, for the plaintiffs, contended, that the case of *Boardman v. Sill*, 1 Camp. 410 (a), was nearly in point; and that the plaintiffs were entitled to recover; because, at the time of the demand, he claimed no lien, and therefore must be taken to have waved it: and besides, it was clear, that he meant to rely, not on the lien, but on the purchase, as he equally refused to deliver up those cloths on which he had no lien.

PARK, J., was of opinion, that unless the defendant had waved his lien, it still existed in his favour; and that nothing like a waiver of the lien appeared in this case. His lordship therefore directed the jury to find the value of the 135 yards only, which they accordingly did; and then found a verdict for the defendant, as to the residue.

Taunton, for the plaintiffs.

———, for the defendant.

[Attornies—*Bevan* and *Harris*.]

COURT OF COMMON PLEAS.

BEFORE BEST, C. J., AND PARK AND BURROUGH, JS.
In Bank.

Taddy, Serjt., for the plaintiffs, moved for a rule nisi May 8th.

(a) In the case of *Boardman v. Sill*, it was ruled, that if a person has a lien upon goods for warehouse rent, and when they are demanded of him, he makes no mention of any claim of lien, but

claims them as his own property, trover may be maintained against him, without a previous tender having been made to him of the amount of his lien.

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& Another,
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for a new trial; because the jury had not found dict for the plaintiff, for the value of the whole cloths. He urged the same points as were taken at trial.

BEST, C. J.—If the defendant had said that he took the goods as purchaser, or in any other right than from his lien, I am of opinion that that would have been a waiver of his lien; but here his omitting to say so right he claimed them, is clearly not a waiver of his lien. The defendant keeps the goods, not saying in what right he claims them, and the plaintiffs seek to recover them in an action of trover. To do that, he having a lien, they must satisfy him the amount of his lien, before they have a clear right to the goods.

PARK and BURROUGH, Js., expressed themselves of the same opinion.

Rule re

April 6th.

FREEMAN v. ARKELL.

If a magistrate, in an action for a malicious prosecution, is called on to produce an information taken before him, and he states that he delivered it at the Quarter Sessions to the Clerk of the Peace, or his clerk; if the Clerk of the Peace proves that he cannot

THIS was a new trial of the case reported at page 324 *supra*.

Dr. Timbrell, the magistrate, proved the delivery of the papers, at the Quarter Sessions, to the Deputy Clerk of the Peace, or his clerk.

Mr. Bloxsome, deputy clerk of the peace, proved that on searching his office, no such papers could be found.

PARK, J.—The Court of King's Bench have held that as Dr. Timbrell, the magistrate, cannot find the papers, and the Deputy Clerk of the Peace also

find it in his office, that is sufficient proof of loss, to let in secondary evidence, without the clerk of the Clerk of the Peace.

that is sufficient presumptive evidence of their loss, to entitle the plaintiff to give secondary evidence of their contents, without calling Mr. Bloxsome's clerk.

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Evidence was given to show a want of probable cause and malice.

Verdict for the plaintiff; — Damages, £5.

Campbell and Godson, for the plaintiff.

Tamton and Russel, for the defendant.

[Attornies—*Godson and Fryar*.]

See this case, *ante*, page 135.

JONES and Others v. CARRINGTON, Clerk.

April 6th.

THIS was an issue, directed by the Vice-Chancellor, to try "whether, from time whereof the memory of man runneth not to the contrary, there had been payable and paid, and of right ought to be paid, to the Vicar of the parish of Berkeley, one penny for every milch cow kept in the parish, at any time within the year, the sum of one penny, at Lammas, old style." And a similar issue on a modus of one penny for every colt.

Issue to try moduses — Evidence.

The defendant at law was vicar of the parish, and the plaintiffs at law were farmers there. A bill had been filed by the vicar for an account of all small tithes: at the hearing, moduses on many other articles were insisted on; but all of them were then disposed of, except these two, as to which the present issues were ordered.

deposition of any owner of lands in the parish, who had died since the hearing, to be read, though it did not appear, by his deposition, that he was an owner of lands.

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The plaintiff's counsel wished to read a part of the deposition, in which he proved the signature of the Rev. S. Jenner (a former Vicar) to a paper.

The defendant's counsel objected, that as Dr. Jenner was examined to merits, it invalidated his whole deposition; and further, that even in the answer to the interrogatory under which he proved the handwriting, he said something in favour of the paper he proved.

PARK, J.—Those parts of the deposition, which go to prove the handwriting only, may be read, and no others.

The paper so proved, was read.

It was an agreement for a lease, for seven years, of the vicarial tithes of Berkeley, to Samuel Pearce; it was not under seal, nor on any stamp.

The plaintiff's counsel wished to give in evidence, receipts for the payments, laid as moduses, given by Samuel Pearce to different occupiers of lands in the parish.

Whether the receipts of a vicar's lessee are admissible evidence of a modus—
Quære: and also, what is sufficient proof that he is lessee.

The defendant's counsel objected to the admissibility of these receipts, on the ground, that tithes lying in grant, and not in livery, no interest passed by this agreement, which was not under seal; and further, that if it did constitute Pearce a lessee of the tithes, his receipt was no evidence against the rights of the church, as the acts of a lessee for years, of a tenant for life, could never be binding on the rights of the inheritance, and cited the case of *Wood v. Veal*, 1 Dow. & Ry. 20.

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PARK, J. held them admissible.

They were read.

A witness proved, that for about 40 years before the incumbency of the defendant, her father and brother, named Croome, had successively been tenants of the tithes (after Pearce) under the six immediate predecessors of the defendant.

The plaintiff's counsel wished to put in the receipts of the Croomes.

The defendant's counsel contended, that this certainly was not enough to connect them with the vicars.

PARK, J., however, held the receipts admissible.

Another witness was called, who admitted that he was an owner of lands in the parish, and stated that he had found the receipts he produced among the papers of his wife's father, who was a relation of the person who was named in the receipts, as having paid the money.

The defendant's counsel objected, that as he was an incompetent witness, he ought not to be allowed to give evidence to accredit the papers he put in; for that, though an interested witness might hand in papers, he was not to be allowed to give any oral account whatever.

PARK, J.—He may say where he got the papers he puts in, though he is interested.

Some old witnesses proved a reputation in the parish, that there were such *modus*es (b).

(b) In cases of parochial *modus*, the general reputation in the place, that there is or is not a *modus*, is evidence; but it is generally of little value, as in most cases the witnesses on each side prove the reputation to be their way. Witnesses very often differ as to facts, and oftener still as to reputation.

For the defendant.—An examined extract from Pope Nicholas's Taxation.—An examined extract from the Valor Ecclesiasticus, temp. Henry 8th.—And an examined extract from the Parliamentary Survey of 1649 (c) were

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(c) This survey was founded on inquisitions taken before commissioners, in which a jury found the ecclesiastical state of each parish at that time; and the great accuracy of this survey is spoken of by Lord Ellenborough, in 11 Ea. 284, and 1 M. & S. 294. Of these inquisitions, (under the seals of the jurors,) a few remain in the Rolls chapel, and one of them, relative to the living Lakenheath was produced, from the registry of the bishop of Norwich, in the recent case of *Butt v. Wiseman*; but a perfect copy of the whole of them is contained in several large MS. volumes, which are deposited in the library of Lambeth palace. These volumes are but copies of the original inquisitions; but as the originals were mostly burnt, these copies are evidence. But it should be observed, that an examined extract of the Parliamentary Survey in Lambeth palace is evidence, though it may be said it is but the copy of a copy. I have seen these examined extracts constantly given in evidence, both in courts of law and in Equity. The only cases in print that I am aware of, that regard the admissibility of the surveys taken by the authority of the Parliament during the usurpation, are *Underhill v. Durham*, Freem. 509, and 2 Gwill. 542, and the cases there cited, which decide that, though taken during a usurp-

ation, they are evidence. With regard to the admissibility of a copy of the Survey in Lambeth palace, I have been favoured with an exact copy of a note of a decision on the subject. This note is in the handwriting of Dr. Ducarel, who was formerly keeper of the records there, and is written in the volume which contains the index to the Parliamentary Survey.—The learned Doctor's note, which I have seen, is in the following terms:—"19th July, 1775. In the Exchequer; Sittings after Trinity Term, at Serjeant's Inn, present, Lord Chief Baron SMYTHE, the Barons EYRE and BURLAND: *Travis against Oxton & Others*. Concerning the tithe hay of Netherpool, within the parish of Eastham in Cheshire. A copy of the Parliamentary Survey of church lands (so far as relates to this parish,) long since deposited in the MS. library at Lambeth, and properly authenticated by the archbishop's librarian and keeper of his records there, being offered to the Court as evidence on the behalf of the plaintiff, it was objected on behalf of the defendant, 'that the survey deposited at Lambeth being itself only an office copy, it ought to have been produced there, and not an authenticated copy thereof, which it was said could not be admitted as evidence.' But upon the plaintiff's counsel producing to the

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put in. Neither of these mentioned any *modus* to be payable in this parish. An examined copy of the bill, answer, and depositions, in a suit in the Exchequer, in the reign of Charles the Second, between the then vicar, and an occupier of lands, for an account of small tithes, was also put in. This suit was the case of *Dasfield v. Carnocke*, reported in Hardres, 329; the then defendant did not set up any *modus*, and one of his witnesses stated, that the vicars of Berkeley always received "the private tithes of the parish" (*d*).

Court (from the printed journals) the three orders of the House of Commons, dated August 6th, and August 7th, 1660, and May 19th, 1662, relative to these Parliamentary Surveys, the Court over-ruled the objection, and unanimously agreed, that these surveys, and all other papers delivered with them to the then archbishop of Canterbury were originals, and ordered authenticated copies of them to be henceforth admitted as evidence; and an entry of this order was that day made in the register book of the Court of Exchequer." The orders of the 6th and 7th of August merely direct, that all records relative to church lands and property be deposited in an office in Broad Street, and that of the 19th of May states, that Mr. Crouch, a member of the House, stated that he had received from Mr. Nye, in pursuance of the orders of the House, divers presentations, books of institutions, and other records and writings relative to ecclesiastical livings, and desired the direction of the House. The House ordered that the records, presentations, books

of institutions, and other writings, should be delivered into the hands of the Most Rev. Father in God, the Archbishop of Canterbury, "who is desired to take care thereof, that the same may be preserved in perpetuity for public use." Another vote follows regarding records, which relate to the different bishoprics and chapters, which are also to be delivered to the archbishop, who is to send them last to the respective bishops and chapters who are therein concerned, if he thinks fit. "And it is further ordered, that these votes be printed and published; that all persons concerned may take notice thereof."

(*d*) Old depositions in former tithe suits, in the same parish, are constantly admitted in evidence, and so are answers, if they relate to the tithes of the same lands; and these are equally evidence, whether there has been any decree or not. To give the deposition in evidence, you must put in examined copies of the bill and answer, before you can give in evidence the examined copy of the depositions. But it has been

An examined extract of the minister's accounts in the augmentation office was produced, to show that a place called Hulle, *alias* Hill, was a hamlet of Berkeley, in the reign of Henry 8th; and from the extract from the Parliamentary Survey, it appeared that it was so in 1646.

1824.
JONES
& Others
v.
CARRINGTON
Clerk.

The incumbent of the living of Hulle, otherwise Hill, proved that it was now called a parish, and that he received the vicarial tithes of it in kind, and that no *modus* was ever claimed there to his knowledge or belief.

On this evidence the jury found a Verdict for the plaintiffs, on both issues.

Tunton, Ludlow, Campbell, and Twiss, for the plaintiffs.

Curwood, Russel, and Cross, for the defendant.

[Attornies—*White and Keene*.]

held, that depositions may be read without the bill and answer, if they are so ancient that no bill or answer can be forthcoming; as, formerly, bills and answers were not enrolled. See *Bryon v. Boolts*, 2 Price, 234. In *Illingworth v. Leigh*, 4 Gwill. 1619, the depositions made in an old suit were tendered in evidence before HEATH, J. without producing the bill and answer, or proving that due diligence had been used to discover them, but without effect; HEATH, J. held them clearly inadmissible. On a motion for a new trial, the Court of Exchequer held that the learned Judge was mistaken in rejecting the evidence; but Sir H. Gwillim adds, that he was informed that the Judges gave no reasons why

they thought the depositions admissible under these circumstances. In the case of *Hunt v. Douglas*, (MS.) sittings after M. T. 1821, which was an issue to try a *modus*, Copley, Serjt. objected, that certain old depositions should not be read, as the bill and answers had not been produced. But it appearing that they had been searched for and could not be found, ABBOTT, C. J. said, "As search has been made for the bill and answer, and they cannot be found, I must admit the depositions without them." However, the bill and answer are always highly material if they can be got, as they show whether or not the point the witnesses speak to was in issue or not.

1824

May 28th.

BEFORE SIR J. LEACH, KNIGHT, VICE-CHANCELLOR.

Curwood now moved that his Honour would Mr. Justice PARK, for a copy of his notes of this issue, on the ground that the receipts of *Pe* the receipts of the *Croomes* were inadmissible; the receipts of a lessee for years of tithes, were dence against the rights of the perpetuity; and that there was no sufficient evidence to show the lessees; and on the ground that interested witnesses not to have been permitted to speak in favour of cuments they produced; and that if inadmissible had not been received, the weight of evidence would be clearly with him.

The Vice-Chancellor granted the motion (e).

(e) The Court of Chancery, when it directs the issue, always orders, that if the parties cannot agree on the form of the issue, it shall be settled by one of the Masters; but in general, the declaration on the issue is drawn and signed by the junior counsel of the plaintiff at law, (who is usually the defendant in Equity), who also draws the plea, which is always in the same form, as it always admits the supposed wager mentioned in the declaration, and only contests the fact to be tried by the issue; and this draft is sent to the opposite party, whose counsel examines and signs it. The case is then conducted through all its stages in the common law court, precisely as any other action would be; and if either party wishes to have a special jury, it is struck in the same way as it would be in an action. The case is tried in the

usual way, except that the plaintiff never loses the verdict in the cause he does not prove the affirmative of the issue put in issue. The order for the issue is laid, as it is always the order for the issue, and the jury may find special facts. The Judge indorse such facts back of the record. If a new trial is wished, it cannot be obtained in the court of law, but may be obtained in Equity. It may be applied for a new trial in any branch of the Court of which directed the issue. The case of *Pemberton v. D* 11 Ves. 50, decides, that the issue is directed by the Court of the Rolls, a motion for a new trial may be made before the Vice-Chancellor. A new trial may be moved for on any grounds on which it could be obtained in a case in a court of law, such as misdirection of the

ADDENDA.

COURT OF COMMON PLEAS.

BEFORE BEST, C. J., AND PARK AND BURROUGH, JS.

RAWLINGS v. HALL.

May 22nd.

SEE *ante*, p. 11. The rule for a new trial in this case having been argued, the Court were of opinion, that the broker (Little) was bound to produce his books, kept under the statute 7 Geo. 2, c. 8, § 9, though he might thereby criminate himself; but as he had no notice to produce his book kept under this statute, but only was commanded by his subpoena *duces tecum*, to produce his "contract book," the Court made the rule absolute for the new trial, on payment of costs.

verdict against evidence, &c. The rule is, for one of the counsel, who was at the trial (generally the senior), to go into the Court of Equity, and move that the Lord Chancellor, or Vice-Chancellor, (as the case may be), will apply to the Judge who tried the case, for a copy of his notes of the trial. Some good ground must be stated for this motion, as, if granted, it is considered as tantamount to a rule nisi for a new trial in a common law court. Of this motion, two days previous notice must be given to the opposite party, who may oppose it by counsel if he chooses. It is not absolutely necessary that this motion should be made within the first four days of the term after the trial; but it is made on one of the

days appointed by the Lord Chancellor for hearing motions (which are called seal days); and if it is granted, the Judge of the Court of Equity sends to the Judge who tried the issue, for a copy of his notes. When the Judge has sent his notes, the motion for a new trial is in a state to be argued, and of this argument two days' notice is also necessary. The case is then argued by the counsel on both sides, usually by those who were at the trial, in addition to some of the Equity counsel originally engaged, and the Judge of the Court of Equity decides whether there shall be a new trial or not. On issues out of Chancery, no costs are given in the court of law; but they are in the discretion of the Court of Equity.

MAY and Ors. v. MAY and Ors.

SEE *ante*, p. 44. The rule *nisi* for a new trial in case, was never drawn up, the case being compromised

THE cases of *Sanderson & Others*, assignees of *Barg Laferest*, *ante*, 46; and *Lee v. Joseph*, *ante*, 46; were compromised, before the rules *nisi* for a nonsuit in former case, and for a new trial in the latter, came on to be argued. These cases were therefore struck out of paper.

EVANS v. YEATHERD.

SEE *ante*, p. 49. In this case the Court made the rule absolute for a new trial.

COURT OF EXCHEQUER.

**BEFORE ALEXANDER, C. B., AND GRAHAM, GABRIEL,
AND HULLOCK, BS.**

May 31st.

HULME, Clerk v. PARDOE, Widow.

SEE *ante*, p. 93. In this case a rule *nisi*, for entering a nonsuit, had been obtained; but upon argument, the Court, being of opinion that the verdict ought to stand, discharged the rule.

COURT OF KING'S BENCH.

BEFORE BAYLEY, HOLROYD, AND LITTLEDALE, J.

BLOXSOME v. WILLIAMS.

SEE *ante*, p. 294. The Court, after hearing the argument for entering a nonsuit in this case argued, were of opinion that the verdict for the plaintiff ought to stand, and therefore discharged the rule.

CASES

AT

NISI PRIUS.

AT THE

Sittings in and after Trinity Term.

PROMOTIONS.

IN Trinity Term, STEPHEN GAZELEE, Esq. one of his Majesty's counsel, was called to the degree of Serjeant at Law, and afterwards appointed one of the Judges of the Court of Common Pleas, *vice* Sir JOHN RICHARDSON, Knight, who resigned; and ROBERT SPANKIE, Esq. and JOHN ADAMS, Esq. were called to the degree of Serjeant at Law.

COURT OF KING'S BENCH.

Sittings at Guildhall, in Trinity Term, 1824.

BEFORE MR. JUSTICE LITTLEDALE.

(Who sat for the Lord Chief Justice.)

WEBB *v.* SMITH, Gent. one &c.

1824.
June 30th.

ASSUMPSIT against an attorney by a copying clerk for wages. An articked clerk to an attorney, who is bound by his oaths to keep all his master's secrets, is at liberty to give in evidence statements of his master not made under a charge of secrecy, nor affecting the interests of the master's clients; tho' the disclosure may go to support a civil action against the master.

1824.
 WEBB
 v.
 SMITH, Gent.
 one &c.

Mr. Frankum, an Attorney, was called on the part of the plaintiff, and asked whether the defendant had not made some statement to him respecting the salary he intended to give the plaintiff.

The witness objected to answering, on the ground that the statements enquired after were made during the time he was serving as an articled clerk to the defendant; and that by his articles he was required to keep all his master's secrets, for the performance of which articles he had also given a bond.

LITTLEDALE, J. inquired if the defendant had entrusted these statements to him as a secret; and was answered, that he did not give any directions, that they were not to be communicated.

His Lordship then ruled, that, as the statements did not relate to any matter of business affecting the interests of the defendant's clients, nor were specially entrusted as a matter of secrecy, there was not any objection to their being given in evidence.

Verdict for the plaintiff.

Scarlett and Talfourd, for the plaintiff.

Gurney and the Common Serjeant, for the defendant. —

[Attornies—*Fisher and Hamilton & Twining.*]

1824

Sittings after Trinity Term, in London.

BEFORE LORD CHIEF JUSTICE ABBOTT.

ATKINSON v. COLESWORTH.

July 9th.

ASSUMPSIT by the captain of the brig Agaphea, against the defendant, for freight and primage. The first count of the declaration was on an agreement of charter party, (not under seal) bearing date the 21st of June, 1823, between the plaintiff, who was therein described as "commander of the good ship or vessel, called the Agaphea," and the defendant; by which it was agreed, that the vessel should take on board a cargo, and proceed to Pernambuco; and, having delivered it, should there, or at Paraiba, take in a homeward cargo, and deliver it at London, or Liverpool, (as directed), on being paid freight and primage (at the rates specified). The freight to be paid on unloading and right delivering of the cargo, by a good and approved bill, payable in London, at two months date from the day of final discharge; and for the performance of the agreements of the charter party, the *parties thereunto* bound themselves, &c.; and the charterer agreed to advance the said master £150, on the vessel's arrival in London or Liverpool; the said master allowing the usual interest for the same, and the amount to be deducted from the bill before mentioned. The plaintiff then averred performance of the different things to be done by him and the ship; and a breach, that the defendant refused to pay the freight, by a good and approved bill, &c. (in the terms of the charter party) or by any other bill or bills, or in cash, or otherwise howsoever; but wholly neglected, &c. There were also an *indebitatus* count for freight, and the common money counts. Plea—General issue.

If the master of a ship enter into an agreement of charter party, not under seal, in which the defendant agrees to pay him the freight, by good bills: whether the defendant is justified in paying them to the owner of the ship, after notice by the master not to do so.—*Quere.*

1824.

ATKINSON
v.
COLESWORTH

The charter party was proved and put in. The terms of it were as stated in the first counts of the declaration, and, from the other evidence, it appeared, that a person named Hodgins was the owner of the vessel; and that, after her arrival at Liverpool, a person named Bains, who was the agent of Hodgins, the owner, desired the defendant not to pay the plaintiff the amount of the freight, but to pay it to him instead. The defendant declined paying it to Bains, without an order from the captain (the plaintiff's agent) and on the 5th of January, 1824, the plaintiff had given such order, the defendant paid to Bains, the owner's agent, £150; however, on the 15th of January, the plaintiff sent a letter to the defendant, to desire him to pay no more freight to any one but himself; but the defendant did, after this, pay the residue to Bains, the owner's agent.

ABBOTT, C. J.—I am of opinion, that, in this case, the captain was only acting as agent for the owner; and, being so, the owner had a right to change his agent if he chose; and he has done so. The plaintiff must be called

Nonsuit, with leave to move to enter a verdict for the plaintiff.

Gurney and Chitty, for the plaintiff.

Scarlett, for the defendant.

[Attornies—*Woodward & H.* and *Blunt & R.*]

BEFORE ABBOTT, C. J. BAYLEY, HOLROYD, & LITTLEDALE
In Bank.

Nov. 12th.

Gurney moved to set aside the nonsuit in this case and enter a verdict for the plaintiff; and the Court granted a rule to shew cause.

The case of *Splidt & Ors.* assignees of *Holmes v. Bowles*, 10 Ea. 279, decides, that a covenant in a charter party to pay freight to the owner for the hire of the ship, is not transferred to a vendee by a bill of sale of the ship made during the voyage. By *Morison v. Parsons*, 2 Taunt. 407, it appears, that if an owner enter into an agreement of charter party; but, before the ship sails, he sells her, the vendee is entitled to the freight, as incident to the ship; but in order for him to succeed at Law, he must sue in the name of the contracting party, and not in his own name. In the case of *Schack & another v. Anthony*, 1 M. & S. 573, the captain of a ship, as agent for his owners, had entered into a charter party, under seal, with the defendant, to deliver goods at a certain freight. The owner now brought an action of *assumpsit* for the amount of that freight; but the Court held, that the same interest being secured by deed, *assumpsit* would not lie;

and that if a bond were given to a trustee, it could not be contended, that the *cestui que trust* could maintain *assumpsit* for the recovery of the money secured by the bond. The case of *Smith*, assignee of *Kirkpatrick, v. Plummer*, 1 B & A. 575, decides, that the captain has no lien on the ship, or freight, for his wages, or for money expended by him during the voyage. But in *White v. Baring*, 4 Esp. 22, (a much earlier case than the one above cited) a captain recovered at *nisi prius*, before Lord Kenyon, on a bill of lading, he having made the contract in question; and having made contracts on account of the ship, on the faith of the freight being paid to him; Lord Kenyon however permitting him only to recover to the amount of the contracts he had so entered into. This case was mentioned in the course of the argument in *Smith v. Plummer*; but was not alluded to by the Court in giving judgment.

1824.
ATKINSON
v.
COLESWORTH

BEFORE MR. JUSTICE LITLEDALE.

(Who sat for the Lord Chief Justice.)

JOSEPHS v. PEBRER.

July 9th.

ASSUMPSIT for work and labour, and money paid; with the common counts. Plea—General issue.

A note sent by a broker to his principal of a purchase he

had made, does not require a stamp, as a minute or memorandum of an agreement; although the subject of the purchase be above 20*l.* value, and not within any exemption from stamp duty.

Whether an agreement relative to the buying of shares in a proposed joint stock company; to authorise which, no act of parliament has passed, or charter been granted, can be enforced.

—*Quere.* Whether a broker, who contracts a purchase for his principal, afterwards making good the contract, can recover the money he pays to complete it, of his principal, on any of the common money counts—*Quere.*

1824.
 JOSEPH
 v.
 PEBRER.

This action was brought to recover the price of ten shares in the Equitable Loan Bank, and the broker's commission for the purchase of them.

On the 7th of April, 1824, the plaintiff was employed, as a broker, by the defendant, to buy for him ten shares, of £50 each, in the Equitable Loan Bank, *for the day of their coming out*. At this time meetings had been held for the purpose of obtaining an Act of Parliament for the establishment of a joint stock company, with a capital of two millions, consisting of shares of £50 each for lending money on pledges of personal property, at the rate of 10% per cent. interest; and a deposit of 1% per share was to be paid on the day on which the certificates for such deposit were ready to be delivered out. This paying of the deposit, and delivery out of the receipt for it, was technically called the coming out of the loan. A bill was subsequently brought into Parliament, for the establishing of this company, but it did not pass. However, on the 7th of April, (the loan not having then come out) the plaintiff bought ten shares, of a person named Goldsmidt, for the defendant; and, on the 21st of April paid Goldsmidt 5% 10s. per share, that being 1% per share for deposit, and 4% 10s. premium; in all 6% : and the plaintiff also charged 2% 10s. for commission; and a sale note was sent by the plaintiff to the defendant.

The plaintiff's counsel wished to give this note in evidence. It was in the following terms—

“ London, 7th April, 1824.

“ Signor Pebrer,

Bot. by your order, and for your account, ten shares Equitable Loan Bank, of S. Goldsmidt, for the coming out.

“ 5% 10s. premium per share.

“ ———Commission, 2% 10s.

Your most obedt. servant,

“ Amount payable, £——

E. Joseph

“ If any errors, please to signify the same immediately.”

Gurney, for the defendant, objected, that this note could not be admitted in evidence, because it was not stamped; and being the minute, or memorandum of a contract, it required a stamp (a): ordinary broker's notes, indeed, were admitted in evidence without stamps, because they related to the sale of goods, wares, or merchandizes, which are within one of the exemptions of the Stamp Act.

1834.
JOSEPH
v.
PERRER.

LITLEDALE, J. I am of opinion, that this paper does not require a stamp. The minutes or memorandums of agreements which are charged by the Stamp Act, are minutes or memorandums between party and party:—this is merely the broker's account to his principal of what he has done. If the broker were agent for both parties, and made a minute of this bargain, such minute must be stamped, but as he is only agent for one party, and makes the minute for his own principal, it requires no stamp.

The note was read.

It further appeared, that the plaintiff got the certificates for the shares, on the 21st of April, from Messrs. Fry & Chapman, who were bankers to the loan; but that, on the 23d of April, defendant said he would not receive them, saying that they were procured too late, as the loan was proved to have come out on the 15th of April, and the value of shares had sunk in the mean time. It was also proved,

(a) By the Stamp Act, 55 Geo. 3, c. 184, sch. part 1, "Agreement, or minute, or memorandum of an agreement made in England, and under hand only, when the matter thereof shall be of the value of £20. or upwards, whether the same shall be only evi-

dence of a contract, or obligatory on the parties, from its being a written instrument, together with every schedule, receipt, or other matter put or indorsed thereon, or annexed thereto," are charged with a stamp duty of 1*l*.

1824.
 JOSEPHS
 v.
 PEBBLES.

that sales are continually made in *omnia* as as a loan is proposed, and before any of the receipt certificates of it are delivered out.

Gurney, for the defendant, contended, that the plaintiff must show who this company are. This company raise a large capital, consisting of small transferable shares; and before they get an Act of Parliament to them to do so, they are a non-existent body; and shares, or any agreements relating to them, are matter of honor; and any contract relative to them cannot therefore be enforced in a court of Law. Another, that if the company did exist at all, it was an illegal company, under the statute 6 Geo. 1, c. 18, s. 18 (1) therefore contracts relative to shares in such a company would be void.

Chitty, on the same side.—It appeared by the opinion of the plaintiff's own counsel, that this was a plan to raise money at a larger interest than is allowed by law; they speak of an intended Act of Parliament; that till such an Act is passed, the company itself is in prospect. And another point in this case is, that the plaintiff bought these shares as an agent for the defendant; and he therefore cannot recover the

(b) The statute, 6 Geo. 1, c. 18, s. 18, enacts that undertakings to the prejudice of trade, and subscriptions to pretended corporations, and transfer of shares therein, shall be illegal and void. This statute appears to have been made to suppress certain fraudulent schemes for joint stock companies then prevailing in this country. It possesses considerable obscurity in its enactments.

In the case of the *King v. & Others*, 14 East, 406, *LENBOROUGH* gives a very able judgment on the meaning of this statute; and more information on this subject, may be derived from the cases *King v. Dodd*, 9 Ea. 516; *v. Holt*, 4 Taunt. 587; *Hutchinson*, 15 East, 51; *Buck v. Buck*, 1 Camp. 5

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of them from the defendant, on the common count for money paid, or indeed on any of the common counts; and the case of *Child v. Morley*, 8 T. R. 610 (c), decides this point; and if an agent is bound to pay money to complete a bargain he has made for his principal, he can only recover it of his principal on a special count, stating a special contract. An auctioneer might just as well pay the purchase-money for an estate, and then sue the purchaser for money paid.

Marryatt, contra. The case of *Child v. Morley* turned in some degree on the stock-jobbing Act, but in this case the plaintiff has bought the article, and paid the whole price of it to the seller. It is further said, that the company is an illegal one, but the certificates state, that the party is to have the shares, subject to the provisions of any future Act of Parliament; and, before such Act passes, to the regulation of the directors.

LITLEDALE, J.—The facts proved are, that, on the 7th of April, the plaintiff bought the shares of Goldsmidt, and paid for them on the 21st. but they were not rejected till the 23d. therefore, there was no recall of the authority given to the plaintiff, to buy them, before the plaintiff had actually paid the money for them. However, I shall reserve three points.—*First*, whether the sale note requires a stamp.—*Second*, whether the plaintiff can recover on the common counts.—*Third*, whether it was an illegal company.

The defendant's counsel then went to the Jury on the

(c) In the case of *Child v. Morley*, 8 T. R. 610, the plaintiff, a broker, had agreed with a purchaser for the sale of stock, which was the property of the defendant, his employer, for a future day. The defendant refused to complete the bargain, and the plaintiff paid the differences to the purchaser. It was held, that he could not recover them again of his principal, on a count for money paid.

1824
 JOSEPHS
 v.
 PERRER.

question, whether the loan had, or had not, come out earlier than the 21st of April, and whether the plaintiff had used due diligence.

Verdict for the plaintiff, damages 67*l.* 10*s.* being 65*l.* paid, and 2*l.* 10*s.* commission.

Marryatt and Comyn, for the plaintiff.

Gurney and Chitty, for the defendant.

[Attornies, *T. N. Williams* and *Fenton*.]

BEFORE ABBOTT, C. J. BAYLEY, HOLROYD & LITTLEDAL, JR.
 In Bank.

Nov. 9th. *Gurney* moved to set aside the verdict, on the points reserved at the trial; and also because the verdict was against evidence.

The Court granted a rule to show cause.

Sittings at Westminster after Hilary Term.

BEFORE LORD CHIEF JUSTICE ABBOTT.

July 11th.

DOE, on the Demise of MORECRAFT v. MEUX.

If ejectment is brought on a forfeiture of a lease, and after the bringing of such ejectment the landlord accept rent, it is no waiver of the forfeiture.

EJECTMENT to recover premises, the lease of which was forfeited by a breach of covenant in not repairing

after notice, which, by the terms of the lease, was to incur a forfeiture. The defence was, that the lessor of the plaintiff had received rent from the defendant since the bringing of the ejectment, which, it was contended, waved the forfeiture.

1824.
Doe, on the
Demise of
MORECRAFT,
v.
MEUX.

ABBOTT, C.J.—I am clearly of opinion that the receipt of rent, after an ejectment is brought on a forfeiture, is no waiver of such forfeiture.

However, at the request of the defendant's counsel, the Jury found for the lessor of the plaintiff, subject to a special case.

Marryatt and Chitty, for the lessor of the plaintiff.

Scarlett and Brougham, for the defendant.

[Attornies—*Pearse and Smith & A.*]

DEAN v. WHITTAKER and Another, Sheriffs of Middlesex. July 12th.

ACTION on the case. The first count of the declaration stated, that the plaintiff was the proprietor of certain goods, which were lent to one Greathead for a term not then expired, and that the defendants contriving, &c. to injure the plaintiff's reversionary interest in the goods, took them, and absolutely sold them. There was also a count in trover. Plea—General issue.

If a party has goods on hire for a term, and the Sheriff seizes them under an execution against such party, the owner of the goods may maintain an action on the case against the Sheriff, if the Sheriff sells the entire property of such goods:

Before the case was gone into, *Scarlett*, for the defendant, objected, that it appeared by the record, that the

but to support the action, he must show, that, as soon as the goods were seized, he apprised the Sheriff that the goods were lent for a term only, in order that the Sheriff might know that he had only a right to sell the qualified property that the hirer had in the goods.

1824

DEAN

v.

WHITTAKER
and Another,
Sheriffs of
Middlesex.

plaintiff had lent the goods to Greathead, and that the defendant, as Sheriff, might lawfully seize them under an execution against Greathead; and therefore the plaintiff can maintain neither trespass nor trover.

ABBOTT, C. J.—The Sheriff might no doubt seize all the interest that Greathead had in the goods, and therefore the plaintiff can maintain neither trespass nor trover; but I see no reason why an action in this form may not be supported.

From the evidence, it appeared, that the officers of the Sheriff of Middlesex took the goods in question under a *fi. fa.* against Greathead for 46*l.* As soon as the officers took them, they were told that they were only hired goods, the property of the plaintiff; and on the 20th of February, 1824, the officers received notice from the plaintiff, that all the goods seized, except the wearing apparel of Greathead and his family, and a piano forte, were his property; and that some days after this the plaintiff paid 46*l.* into the hands of the Sheriff to redeem the goods, and *that no steps whatever had been taken for the sale of the goods under the execution.*

The defendant's counsel objected, that the plaintiff had declared on an injurious sale by the Sheriff, whereas there was no sale, nor even were steps taken relative to a sale.

ABBOTT, C. J.—I think this won't do. It is not shown that the Sheriff had any present intention to sell. It seems to me, that to maintain this action, the plaintiff should have given the Sheriff a special notice, stating, that the goods were lent for a term only, and that he (the Sheriff) ought not to sell any more than the interest that Greathead had in the goods.

Gurney contended that the Sheriff ought to have seized them in that special way.

ABBOTT, C.J.—No. *Prima facie* the Sheriff had a right to seize the whole of the goods entirely, as they ostensibly belonged to Greathead, but if you had apprized the Sheriff of your special rights he would have sold accordingly.

1824.
DEAN
v.
WHITTAKER
and Another,
Sheriffs of
Middlesex.

Nonsuit.

Gurney and *Banks*, for the plaintiff.

Scarlett and *Platt*, for the defendant.

[Attornies—*Lindsell* and *Green & Ashurst*.]

BEFORE ABBOTT, C.J. BAYLEY, HOLROYD, & LITLEDALE, JS.

In Bank.

Gurney moved to set aside the Nonsuit, and contended that the entry of the Sheriff and the taking of the goods were the foundation of the action.

Nov. 11th.

BAYLEY, J.—You should have informed the Sheriff of the nature of your interest; then he might have sold Greathead's interest only. If the goods were let to Greathead from year to year the Sheriff would be entitled to sell the use of them for a year.

Gurney—Does your Lordship think that was an interest which was seizable?

ABBOTT, C.J.—There can be no doubt of that; but it is very desirable that persons should give their notices correctly.

Rule refused.

The case of *Ward v. Macaulay*, 4 Ter. Rep. 489, decides, that where a landlord let a house and furniture on hire to a tenant, and the Sheriff seized the furniture under an execution against the tenant, after notice from the landlord, the

landlord could not maintain trespass against him for so doing; and the case of *Gordon v. Harper*, 7 Ter. Rep. 9, decides, that the owner of goods so let on hire, cannot maintain trover against the Sheriff under such circumstances.

1834.

July 14th.

IRVING v. GREENWOOD.

In action for breach of promise of marriage, if on the part of the defendant it is proved that the plaintiff is a loose and immodest woman, and that he broke his promise on that account, it goes in bar of the action; but if it also appear that, when he made the promise, he was aware of these circumstances, it is no defence. In such an action the defendant may, in mitigation of damages, go into evidence that his relations disapproved of the match; and if his father is an incompetent witness on account of his having employed the attorney to conduct the defence, a witness will be allowed to prove that he has heard the father express to the defendant his dislike to the marriage.

BREACH of promise of marriage.

The promise and the breach were clearly made out. The defendant's counsel wished to show in mitigation of damages, that the father and other relations of the defendant disapproved of the match.

ABBOTT, C. J., allowed evidence to be given of their disapproval, and the reason they assigned for it; and the father of the defendant being an incompetent witness, because he employed the attorney, his Lordship allowed one of the other relatives to prove, that, in his presence, the father expressed to the defendant his dislike to the match, on account of the bad character of the plaintiff.

And in bar of the action, evidence was given to show, that the defendant eventually broke off the match, because he found that the plaintiff was with child by another man.

It was admitted, that, after the promise, the plaintiff had had a child, but it was contended that the defendant was its father.

ABBOTT, C. J., in his summing up to the Jury, said—If you think that the defendant was not the father of the child, he is entitled to your verdict; for if any man, who has made a promise of marriage, discovers that the person he has so promised to marry is with child by another man, he is justified in breaking such promise; and if any man has been paying his addresses to one that he supposes to be a modest person, and afterwards discovers her to be a loose and immodest woman, he is justified in breaking any promise of marriage that he may have made to her; but to entitle a defendant to a verdict on that ground, the Jury must be satisfied that the plaintiff was a loose and im-

modest woman, and that the defendant broke his promise on that account, and they must also be satisfied that the defendant did not know her character at the time of the making of the promise: for if a man *knowingly* promise to marry such a person, he is bound to do so.

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IRVING
v.
GREENWOOD.

Verdict for the plaintiff, damages £500.

Denman and *Brougham*, for the plaintiff.

Scarlett, *Marryatt*, and *Taunton*, for the defendant.

[Attornies—*Smith* and *Sheen*.]

In the case of *Leeds v. Cook*, and others, 4 Esp. 256, Lord ELLENBOROUGH, in an action for breach of promise of marriage, said, that though a promise to marry was proved, yet, if it appeared that the plaintiff was a man who had conducted himself in a brutal and violent manner, and had threatened to use her ill, she had a right to say that she would not commit her happiness to such keeping, and she might set it up as a good legal defence; but his Lordship considered, that the gross manners of the plaintiff only went to the damages, and not to the verdict. And in the case of *Baldley v. Mortlock & Wife* 1 Holt, N. P. C. 151, the defence was, that, previous to the breach of the promise, dishonesty and perjury had been imputed to the plaintiff; and that, the defendant's wife calling upon him to vindicate his character, he said he could do so, but in fact did not, and therefore she broke her promise.—Gibbs, C. J., ruled, that, for her

to be absolved from her promise, she must show that the plaintiff was in fact a man of bad character. For without proof that the charges were well founded, such charges would only go to the damages. To support this action, the promises must be mutual. But in the case of *Sutton v. Mansell*, 3 Salk. 10, in an action by a woman against a man, it was held that "her carrying herself as one consenting and approving" was sufficient evidence of her having mutually promised; and in practice no more evidence on that point is ever given. And in *Holt v. Ward*, 2 Str. 937, it was held, that a promise by one of full age to marry an infant, was binding on the person of full age. A promise to marry is not within the statute of frauds, *Corn v. Baker*, 1 Str. 34. But an executor or administrator cannot sue upon such a promise made to his testator or intestate, *Chamberlain v. Williamson*, 2 M. & S. 408. A bill in Equity lies to compel a party to

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as their surveyor, they told him, that a person, whom they named, would assist him with information; and, that that person told the plaintiff that the soil was good, but he did not say that he ever tried it in any way.

ABBOTT, C. J.—If a surveyor, who makes an estimate, sues those who employ him for the value of his services, and it appear that he was so negligent, that he did not inform himself, by boring or otherwise, of the nature of the soil of his foundation, and it turned out to be bad; this goes to his right of action: and if he went upon the information of others, which now turns out to be false, or insufficient, he must take the consequences; for every person, employed as a surveyor, must use due diligence. Whether the plaintiff has used due diligence or not, is a question for the Jury; and if the plaintiff went on the statements of others, that is no excuse, as it was his duty to ascertain how the fact was, or to report to his employers that he only went on the information of others, or that the fact was uncertain.

Nonsuit.

The Attorney General and Chitty, for the plaintiff.

Marryatt and Patieson, for the defendant.

[Attornies—*Hurd & Johnson*, and *Jenkins & Co.*]

BEFORE ABBOTT, C. J. BAYLEY, HOLROYD, & LITLEDALE, JR.

In Bank.

Nov. 10th.

The Attorney General moved to set aside the Nonsuit in this case, on the ground, that the plaintiff, having made the plans, estimates, and specifications for this bridge, he was entitled to be paid for them, and that if any extra expense had fallen on his employers, by his want of care,

liable to an action for damages. Indeed a part of the plaintiff's claim was money paid by him for journeys in Gloucestershire, &c.

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v.
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LEY, J.—The plaintiff claims as much as his services were worth, and if he led his employers into a great error, by his want of care, his services would be worth nothing.

Attorney General. If an attorney brings an action for his bill of fees, it is no answer to that action that he was negligent; but an action must be brought against him for such negligence.

OTT, C. J.—At the trial, it appeared, that the plaintiff was a subscriber.

Attorney General. As architect and engineer he was therefore his subscription was only conditional.

OTT, C. J.—This bridge was built under the authority of an act of Parliament; by that act, the expense of making and estimates is to be paid by certain trustees: now an action is brought against a committee who managed the work previous to the passing of the act; and, it appeared, that the plaintiff had never examined the plan for the foundation, which it was the bounden duty of an engineer to do; and that by this he had put the commissioners to a great expense.

LEY, J.—I don't see how the action can be supported against these defendants; for, by the act of Parliament, other persons are made liable.

Attorney General. An omitted item in an estimate is really no loss.

OTT, C. J.—If a man employs a person to make

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an estimate, who tells his employer that the work will cost 10,000*l.*, and it costs 15,000*l.*, and it appears that the surveyor did not use due diligence, can it be contended that the employer is bound to pay for such information?

LITTLEDALE, J.—If the plaintiff was a subscriber, he cannot recover in an action. In a case very lately, an engineer to a rail-road was a subscriber, and it was held, that he could not maintain an action. (*Holmes v. Higgins*, above cited).

ABBOTT, C. J.—Without adverting to the subscription, or to the liability of the committee, I think it of the greatest importance to the public, that gentlemen in the situation of the plaintiff, should know, that if they make estimates, and do not use all reasonable care to make themselves informed, they are not entitled to recover any thing. I think, therefore, the Nonsuit was right.

BAYLEY, J.—The plaintiff's demand is for one entire account, and if, from his negligence, the whole of his work is worth nothing, he cannot recover for a particular item, as a journey, as it still was a part of an entire claim, relative to this bridge.

The other Judges concurred.

Rule refused.

July 19th.

MONTAGUE v. R. ESPINASSE, Esq.

If articles of jewellery are supplied to a feme covert while she is

ASSUMPSIT for articles of jewellery.

living with her husband; *assumpsit* cannot be maintained against her husband, unless he get some authority, either express or implied; and in viewing this question, the jury may consider whether the articles were suitable to the state and degree of the husband.

From the evidence on the part of the plaintiff, it appeared, that the goods, consisting of diamond rings, necklaces,

and bracelets of various kinds, and a gold watch and chain, were supplied to the wife of the defendant, who is an eminent special pleader, to the value of 83*l*. 6*s*. in the month of October, 1823; and that the bill was made out in her name; and that the plaintiff's attorney, before the action was commenced, called on Mrs. Espinasse, and told her, that, if the amount was not paid, an action would be brought. It also appeared, that Mrs. Espinasse was a cousin of Lord Petre.

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v.
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Esq.

The defendant's counsel contended, that the plaintiff must be nonsuited; because, on this evidence, the plaintiff had proved a sale of the jewellery to Mrs. Espinasse, and that he had given credit to her, and not to her husband.

ABBOTT, C. J.—What is there to show that the defendant ever knew of this? Did he ever see the articles worn?

The Attorney General. Mr. and Mrs. Espinasse lived together, and therefore his assent may be presumed.

ABBOTT, C. J.—That is so in cases of ordinary goods, but to recover for such articles as these, you ought to prove that the husband saw them worn; however, the defendant had better go into his case.

The defence was, that the articles in question were ordered without the knowledge of the defendant, and that he never saw them; and it was proved by the defendant's nephew, (Mr. J. Espinasse,) and by the defendant's servants, that they were wholly unnecessary for the defendant's wife, as she possessed as much ornamental jewellery, as ladies of her rank usually possess, before and at the time of this supply; and that, in fact, she never wore any one of these articles: it was also

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proved, that the persons from the plaintiff's shop always called at the defendant's house at times of the day when it was known that the defendant was not at his house, but at his chambers: that they uniformly asked for Mr. Espinasse; and that when the plaintiff's shopman delivered the bill, the servant to whom he delivered it said to him "How could Mr. Montague trust my mistress so much I am sure my master does not know it." On which the shopman replied, "We are quite aware of that."

The *Attorney General* contended, that, if a wife living with her husband, and articles of dress are supplied to her, suitable to her estate and degree, her husband is liable to pay for them.

ABBOTT, C. J.—The law is clear. The question is whether these goods were bought by the wife, by the authority of the husband; if they were not bought by the authority, the plaintiff cannot recover. This authority may either be express, or it may be inferred from the circumstances of the case; and, in this view, the state and degree of the defendant is fit to be considered. It should be observed, that these are all articles of ornament and not of necessity or use. A lady has generally authority to manage her husband's house, and to order in from the different tradesmen the necessary goods; but these articles were not necessary in any way, nor even wanted by the wife of a private gentleman. The tradesmen generally take the order from the wife, and often send in a bill to her, but when an attorney applies, it is almost uniformly to the husband; and I was surprised at the contrary in this case. Another strong fact is, that it appears, that no one of the articles was ever seen in the possession of the defendant's wife, by persons who might have seen them if they had been at any time worn by her. This goes to show, that the articles were not suitable to the state and degree of her husband; for, if they had been

she would have worn them; but it seems that they were immediately disposed of. It appears also, that she is related to a family of rank; still it is not the rank of the party, but the estate that must be considered. Persons parting with goods ought to take some care, and if tradesmen are allowed to trust ladies rashly, any man may be ruined; and if tradesmen wish to run no risk on the question, whether the purchase is made by the authority of the husband or not, it is their duty, in all cases where the order is large, to ask the husband, before the goods are supplied, whether the order was given by his authority or not? In short, the question is, were these goods supplied by the authority of the husband or not? If they were, then and then only is the plaintiff entitled to a verdict.

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v.
R. ESPINASSE,
Esq.

The Jury after some consultation asked his Lordship for further directions.

ABBOTT, C. J.—The question is, did the husband give any authority, either express or implied, for the making of this purchase? And to assist you (the jury) on that question, you may consider whether the articles were suitable to the estate and degree of the defendant's wife; however, if they had been suitable, she would have worn them, which it is plain she never did.

Verdict for the plaintiff.

The *Attorney General* and *Platt*, for the plaintiff.

Gurney and *Lawes*, for the defendant.

[Attornies—*C. Gill* and *Hicks & D.*]

BEFORE ABBOTT, C. J. BAYLEY, HOLROYD & LITTLEDALE, JS.
In Bank.

Gurney moved for a new trial on the ground, that the

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R. ESPINASSE.

question left by the Lord Chief Justice to the jury, ~~were~~, whether the goods were furnished under such ~~circum-~~stances as to allow them to presume that they ~~were~~ supplied by the authority of the defendant? and that, upon the evidence, the jury ought to have found for the defendant.

The Court granted a rule to show cause.

See the cases of *Etherington v. Scott*, 1 Salk. 128, and 41; *Bentley v. Griffin*, 5 Taunt. 356, *Waithman v. Wakefield*, 1 2 Ld. Raym. 1006; *Bolton v. Camp*. 120; *Metcalf v. Shaw*, 3 *Prentice*, 2 Str. 1214; *Manby v. Camp*. 22; *Holt v. Brien*, 4 B. & A. 252. *Scott*, 1 Lev. 4, 1 Sid. 109, 1 Mod. 125; *Harris v. Morris*, 4 Esp.

July 21st.

MAYNARD v. — RHODE, Esq.

When an insurance is effected on the life of a third person, by a creditor, and misrepresentations are made by the party whose life is insured, of the state of his health; this will vitiate the policy, though the creditor for whose benefit the policy was effected, was ignorant of the representations being false, and though the party did not die of the disease he was then afflicted with.

ACTION on two policies of insurance effected by the plaintiff at the Pelican Insurance Company, (to which the defendant was secretary,) on the life of Colonel Lyon, to whom the plaintiff was an annuity creditor. One of the policies was dated on the 16th of May, 1823, and was for 690*l.* the other was dated on the 17th of June, and was for 650*l.*

Colonel Lyon died in October, 1823, of a bilious remittent fever. The execution of the policies was admitted, and also the plaintiff's interest.

The defence was, misrepresentation and improper concealment on the part of Colonel Lyon, previous to the effecting of the policies.

To substantiate this defence, it was proved that the office, previous to the execution of the policies, sent

number of printed questions to Colonel Lyon, for him to answer : among which were the two following :—" Who is your medical attendant ?" To which Colonel Lyon answered, " I have none except Mr. Guy, of Chichester ;" and " Have you ever had a serious illness ?" To this he answered, " Never !" Mr. Guy was referred to, and he gave it as his opinion that Colonel Lyon was an insurable life. But it was proved that Mr. Guy had not been called on to attend him for three years previous to his giving his certificate ; but that, in the year 1823, Colonel Lyon was attended, from the month of February to the month of April, by Dr. Veitch, a physician, and Mr. Jordan, a surgeon, for an inflammation of the liver, and a fever, and determination of blood to the head. The former of these gentlemen proved that he considered him to be in a dangerous way, and that he prescribed active medicines, and ordered him sometimes sixteen leeches a-day ; and that he would not have certified him to be in health till the end of the month of May. It was, however, agreed on all hands, that the disease of which he died, had no relation to any of the complaints for which these gentlemen attended him.

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 v.
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ABBOTT, C. J.—The question is, whether any wilful misrepresentation or suppression of the truth took place on the part of Colonel Lyon, to induce the office to effect these policies ; and the jury must consider whether the reference to Mr. Guy, when he was daily attended by a physician and surgeon in town, was intended to prevent a disclosure of his real state of health ? For, if he referred to Mr. Guy, because he would speak well of his health, and thought that, if he referred to the other medical men, they would not so certify, *though he did not die of the disease he was then afflicted with*, I am clearly of opinion, that the defendant is entitled to a verdict. And if the reference was made to Mr. Guy, because he did not know the Colonel's latter state of health, this is such a misre-

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 v.
 RICHMOND, Esq.

presentation as will avoid the policies. And though the party here was an annuity-creditor of Colonel Lyon, yet, if he allowed the Colonel to make these representations when the policy was effected, he is bound by them; and, however hard it may be on the plaintiff, the rules of law must be adhered to.

Verdict for the defendant.

Scarlett, Marryatt, and Chitty, for the plaintiff.

The *Attorney General, Gurney, and F. Pollock*, for the defendant.

[Attornies—*Rogers & Son*, and *Dawes & Chatfield*.]

BEFORE ABBOTT, C. J. BAYLEY, HOLROYD, & LITLEDALE, J.

In Bank.

Nov. 7th.

Scarlett moved for a rule nisi, for a new trial, and contended that, however a misrepresentation or a concealment of the state of facts by the insured might invalidate the policy, yet here the insurer and insured knew equally little of the fraud; and he therefore submitted, that a fraud committed by a third person would not affect the policy; more especially, as the Insurance Office made their own inquiries into the facts.

BAYLEY, J.—Are there not the usual representations in the policy?

Scarlett. There are, my Lord: but though I admit that if Colonel Lyon had procured the insurance, the policy would have been clearly void; yet the present plaintiff Maynard was entirely innocent of the fraud, and therefore ought not to be prejudiced; yet the Lord C

Justice laid down, that, if the representations were falsely made by Colonel Lyon, without the privity of the plaintiff, they avoided the policy.

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BAYLEY, J.—The representation is made part of the policy, and therefore the bargain is only conditional; and it is equally a condition in the policy, let it be made by whomever it may.

HOLROYD and LITLEDALE, Js., concurred.

Rule refused.

WATSON v. BEVERN.

July 21st.

ACTION for a sum of money agreed to be paid to the plaintiff, in consideration that he would give up a house.

The Judge at a trial will not compel a witness to say where he lives, if he states that he believes that a bailable writ is out against him, at the instigation of the party whose counsel had put the question.

The defendant's counsel, in the cross-examination of one of the witnesses, asked him where he lived.

The witness wished to decline answering this, as he believed a bailable writ had been sued out against him, at the instigation of the defendant.

The defendant's counsel submitted, that they had a right to an answer, as they wished to show that the witness had lived in various places, under particular circumstances; and that, if he was the person that they were instructed he was, they had witnesses to call.

ABBOTT, C. J.—As he says, that he wishes not to answer, because a bailable writ is out against him, at the instigation of the defendant, I think he need not answer; and any witnesses that you have may see him here.

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 WATSON
 v.
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The witness therefore did not answer the question.

Gurney and Chitty, for the plaintiff.

Scarlett and Abraham, for the defendant.

[Attornies—*Hodgson & B.*, and *Watson*.]

Adjourned Sittings after Trinity Term, Guildhall.

BEFORE LORD CHIEF JUSTICE ABBOTT.

July 24th.

BEVERIDGE v. MINTER and Another, Executors of
 MINTER, deceased.

The widow of a deceased person is a competent witness for the plaintiff, in an action brought against the executors of such person, on a promise made by him in his lifetime.

THIS was an action to recover a sum of 150*l.* which the defendants' testator, in his lifetime, under special circumstances, promised to pay to the plaintiff.

The widow of the testator was called by the plaintiff, to prove certain admissions of her deceased husband, relative to the money in question.

Scarlett, for the defendants, objected to her being examined.

ABBOTT, C. J.—She is appearing against her own interest. This is an action brought against her husband's executors. If you had called her, the other side would have asked if she took any benefit under the will.

Scarlett. If her husband had been alive, and the action had been brought against him, she could not have been a witness : and can she now charge his estate ?

ABBOTT, C. J.—At present I do not see any objection

The witness was then examined, and clearly proved a promise : but a verdict was taken for the defendants, on the ground, that, upon the facts of the case, there was no consideration for such promise.

The *Common Serjeant* and *Campbell*, for the plaintiff.

Scarlett and *Prendergast*, for the defendants.

[Attornies—*W. Dimes* and *Sutcliffe*.]

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v.
MINTER
and Another,
executors of
MINTER,
deceased.

BLOW v. RUSSELL.

July 24th.

THIS was an action, by the assignee of a bankrupt, to recover the sum of 11*l.* 4*s.* 6*d.*

The defendant pleaded that he was not liable as to all, except the sum of 4*l.* 14*s.* 6*d.* of which he pleaded a tender. To prove the tender, a witness named Cox was called. He stated that he was employed by the solicitor under the commission to collect the debts due to the estate. When he called on the defendant, the defendant pulled out a 10*l.* note, and offered to pay 4*l.* 14*s.* 6*d.* and asked for change; the witness replied, that he was not authorised to take less than the sum demanded, viz. 11*l.* 4*s.* 6*d.* but did not make any objection to the note.

Scarlett, for the plaintiff, submitted, that this was no tender, as the witness, Cox, had no discretion. To make it a good tender, the money should have been offered to the assignees, or to the solicitor.

An offer of a 10*l.* note to a collector appointed by the solicitor to a commission of bankrupt, for the payment of 4*l.* 14*s.* 6*d.*, the sum demanded being 11*l.* 4*s.* 6*d.* is not a good tender in substance; the collector having no discretion on the subject: and if he had such discretion, it is doubtful whether the tender would be good, even in point of form.

ABBOTT, C. J., allowed the objection; and observed, in addition, that, if Cox had had authority to exercise a

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discretion, he should have been doubtful what tender was a good one, in point of form.

Verdict for the plai

Scarlett and Manning, for the plaintiff.

The *Common Serjeant*, for the defendant.

[Attornies—*T. H. Nicholls* and *Collins*.]

Bank notes are not a good tender, if objected to at the time; but if they have been offered, and no objection made on that account, the Court of King's Bench has considered it a good tender; *per* Buller, J. in *Wright v. Reed*, 3 T. R. 554. The money, to make it a good tender, must be produced, unless the other party dispense with its production. Lord KENYON lays down, (*Peake, Rep.* 88,) that the offer of a larger sum, with a re-

quest for change, is a good tender, if no objection is made on that account. And this was decided, in the case of *T. Lubbock*, Mich. T. 1824, tender of 1*l.* 13*s.* was refused. The evidence was, that the defendant offered two sovereigns, and the plaintiff refused the tender, on the ground that more than 1*l.* 13*s.* was tendered. The Court of King's Bench held this a good tender.

July 24th. BARNARD & Another, Asssinees of THURTELL, v.

A horse was kept at the defendant's stables; and one day, when he was from home, three or four of his servants being in charge of the premises, the horse was taken away. The defendant blamed his ostlers for letting it go, but on being himself remonstrated with, replied, that it was of no consequence he was indemnified. Held, that in such case, trover would not lie.

TROVER for a horse. Plea—Not guilty.

The deposition of the defendant, taken before the commissioners of bankrupt, was put in and read; from which it appeared, that he was a livery stable keeper; and that the horse in question was kept at his stables, by the defendant; and that one day, on his (the defendant's) order, the horse was taken away.

The defendant blamed his ostlers for letting it go, but on being himself remonstrated with, replied, that it was of no consequence he was indemnified. Held, that in such case, trover would not lie.

return from Epsom, he found that a man named Cooper, had taken the horse away; and he, in consequence, "remonstrated very severely" with the ostler, for letting the horse go without his consent.

It appeared further, from the evidence of one of the defendant's ostlers, (who saw Cooper riding the horse away, close by the defendant's premises), that he (the witness) had but a short time before left three or four of the defendant's servants in the charge of the stables.

The defendant, when the horse was demanded, said it was in the hands of Cooper; and on being told that he should not have suffered Cooper to take away another person's horse, replied, that it was of no consequence, as he was indemnified.

Marryatt, for the defendant. There is no evidence of conversion; at most, it was only negligence in the servant, which may be the ground of an action on the case.

Abbott, C. J.—On this evidence, certainly, it appears that the horse was taken away without the knowledge or consent of the defendant.

Gurney, for the plaintiff. That is not to be presumed, when the defendant's own expressions are considered; and when it is remembered that there were three or four persons in the care of the premises at the time.

Abbott, C. J.—It appears, on the evidence, that the horse has been got away by Cooper; and that his taking it might, and ought to have been prevented by the defendant's servants; but, unless they concurred, Cooper was a trespasser; and the defendant is not liable in trover though he may be in another form of action.

The plaintiff was then nonsuited.

1824.

BARNARD
and Another,
Assignees of
THURTELL,
v.
How.

1824.

BARNARD
and Another,
Assignees of
THURTELL,
v.
How.

Gurney and Steer for the plaintiff.

Marryatt and Comyn, for the defendant.

[Attornies—*Hewitt*, and *Jones & B.*]

July 26th.

DAVID v. ELLIS and Another.

The funds of a former partner in a firm, which, at the time of his retiring from it, was indebted to a person on a balance of account, are still liable to such person, although he knowingly suffered such balance to remain at interest in the hands of the altered firm, and drew a bill for a certain sum, expressly on the credit of that balance; and wrote letters declaring his confidence in such firm, even after a suspension of payments by them.

THIS was an action for money had and received, and on an account stated.

The facts of the case were these:—The plaintiff, who is a merchant at Montreal, had, for several years prior to April 1821, had dealings with the firm, in England, of Ellis, Inglis, & Co. At that time, Mr. Ellis withdrew from the firm, and the fact of his having done so was announced to the plaintiff by a circular letter, dated the 30th of April, 1821; which stated that the business would be carried on by the remaining partners, who charged themselves with the debts of the old firm. On the 28th of June, 1821, the plaintiff wrote, acknowledging the receipt of the letter advising the change in the firm, and stating that it continued to have his confidence. An account was made out up to the 30th of June, 1821, in which the balance in favour of the plaintiff was stated at 18000*l*. This was sent in a letter dated 17th of July, 1821, which notified, that that sum had been placed to the credit of the plaintiff, in a new account with the new firm. It did not appear that any new books were opened. On the 24th of September, 1821, the plaintiff wrote again, stating that the account was perfectly correct, with a very trifling exception, and that he had transferred the balance in a new account with the altered firm. On the 17th of August, 1822, Mr. Inglis died, and the firm suspended payments, and on the 23rd of September, became

bankrupt. In the month of October, 1822, the plaintiff wrote, and required payment of part of the money due; stating that he considered, that Ellis & Co. were liable to him. Previous to this, he had written, expressing the continuance of his confidence in the firm, though he had heard of Inglis's death, and the suspension of payments. It also appeared, from a second account current, that the plaintiff, while the 18,000*l.* was at interest with the new firm, drew a bill for 5000*l.* on that firm; which he said he had transferred on the account of that fund, and which was accepted and paid.

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and Another.

The question was, whether, under these circumstances, the funds of Ellis were discharged from the plaintiff's debt.

Gurney, for the plaintiff, contended, that they were liable, notwithstanding the notification of the change.

Scarlett, for the defendant, argued that the plaintiff's suffering the 18,000*l.* to remain at interest in the hands of the new firm, and drawing a bill for 5,000*l.* on that fund, together with his expressing his confidence in the firm, after the suspension of payments, discharged Ellis from his liability.

ABBOTT, C. J.—My present opinion is, that Mr. Ellis is not released, but that he is entitled to the benefit of the subsequent payments. I treat it all as one continued concern.

The verdict was for the plaintiff, for 13,160*l.* and Scarlett had leave to move to enter a nonsuit.

In Michaelmas term, Scarlett moved, pursuant to the leave given at the trial, and the Court granted a rule to show cause.

1824.

DAVID

v.

ELLIS,
and Another.*Gurney and Campbell, for the plaintiff.**Scarlett, for the defendant.*[Attornies—*Gordon and Healing.*]

July 26th.

— AUSTIN, Esq. v. WARD.

If a levy is made by the sheriff, and the proceeds paid to the execution creditor, and trover is brought by the assignees of the person against whom the execution issued, he having become bankrupt: if the sheriff suffers judgment in such action to go by default, he cannot recover back from the execution creditor, the money he has paid him, if

ASSUMPSIT for money paid, and money he received.

The plaintiff was sheriff of Kent, and this act brought to recover the sum of 52*l.* 14*s.* the amount levied by his officer on a *fi. fa.* in a cause in which the present defendant was plaintiff, and one Jagger defendant, and which amount, after it was handed over to Ward's attorney, the sheriff was compelled to pay in an action of trover, brought by the assignees of the defendant who was alleged to have committed an act of bankruptcy previous to the levy.

Scarlett, in his opening speech for the plaintiff, cited the case of *Wilson v. Milner* (a), to show that the act was properly brought.

he (the sheriff) could have made a good defence to the action brought against him by the assignees, even though he gave notice to the execution creditor, that he would defend the action, if the execution creditor would furnish the grounds and means for his so doing.

(a) *Wilson v. Milner*, 2 Camp. Rep. 452. If a levy is made on the goods of a trader, after he has committed an act of bankruptcy, and the money levied is paid over to the party; and an action of trover is afterwards brought by the assignees against the Sheriff and the Bailiff, in which damages are recovered; and these, together

with the costs, are paid to the Bailiff: Held, that the Bailiff implied promise on the part of the plaintiff in the original action to indemnify the Bailiff for the costs in the action of trover, and that the Bailiff might recover the money had and received, to back the levy money paid.

It appeared, that the Sheriff, in the action of trover, suffered judgment to go by default; but, previous to his doing, the following notice was sent by his attorney to the defendant in this case, Mr. Ward.

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AUSTEN, Esq.
v.
WARD.

"Sir,

"I do hereby give you notice, that an action has been brought against the Sheriff of Kent, by the assignees, under a commission of bankrupt, awarded and issued forth against Jagger Ansell, of Deptford, to recover the value of the goods sold under the execution issued against the said Jagger Ansell, at your suit, and the proceeds of which sale have been paid over to you, or your attornies. And I do hereby give you further notice, that the said Sheriff is ready and willing to defend the said action, provided you will furnish the grounds and means for his so doing; otherwise, he will suffer judgment to be entered against him by default.

"(Signed)

"Thomas Minchin,

"Defendant's Attorney."

On the examination, in the present case, of the bankrupt's son, who was called to prove several acts of bankruptcy, it appeared doubtful, whether or no the denials to creditors relied on to support them, were not the result of previous arrangement.

ABBOTT, C. J., left it to the Jury, to say, whether these were concerted acts of bankruptcy, or not; and if they found them to be so, they ought to find a verdict for the defendant. With respect to the first question, his Lordship held, that the present proceeding was the same as trying the action against the Sheriff; and that, if the Sheriff could have set up as a defence, that the assignees had no right to recover against him, in the action of trover, he was not entitled to recover now, against the de-

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 AUSTEN, Esq.,
 v.
 WARD.

defendant, notwithstanding the notice he had given to the
 defendant.

Verdict for the defendant.

Scarlett and Jones, for the plaintiff.

Gurney and Campbell, for the defendant.

[Attornies—*T. Minchin and Dickinson & S.*]

In Michaelmas Term, *Scarlett* moved for a new trial,
 and the Court granted a rule to show cause.

July 26th.

HURD and Another v. MORING.

A knowledge of a client's handwriting, obtained by his attorney, from having witnessed his execution of the bail bond, in the action, is not such a confidential knowledge, as to privilege the attorney from answering, when called on the part of the plaintiff, to prove the defendant's handwriting, on the trial.

ACTION on a bill of Exchange, against the defendant as drawer.

The attorney for the defendant was called, to prove his handwriting. He objected, on the ground that he was only acquainted with it from having seen the bail-bond signed, and as that was a proceeding in the cause, he therefore ought not to state the result of knowledge that he had acquired as attorney in the cause.

ABBOTT, C. J.—Was of opinion that there was nothing in the objection, and directed the witness to answer.

Verdict for the plaintiff.

Scarlett and Chitty, for the plaintiffs.

Platt, for the defendant.

[Attornies—*Hurd & J. and Eicks.*]

1824.

BERESFORD v. BIRCH.

July 27th.

ACTION for money had and received, and on an account stated.

The plaintiff claimed a sum of money, together with interest, at the rate of *20l. per cent.* in pursuance of the statute, 49 Geo. 3, c. 121, s. 4, which enacts that if the assignees of a bankrupt shall retain in their hands, or otherwise employ for their benefit, any money, part of the bankrupt's estate, contrary to that Act, and the 5th Geo. 3, c. 30, they shall be charged in their accounts interest at the rate of *20l. per cent. per annum*, on all money so retained, for the time it is so retained, contrary to the said acts; and that the commissioners shall charge such assignees with such sum accordingly.

Interest at *20l. per cent.* given by the 49 Geo. 3, c. 121, s. 4, in the case of assignees of a bankrupt wilfully retaining a balance, cannot be recovered in *assumpsit*, on the common money counts.

Whether the assignee ought not to be charged by the commissioners with such interest, before any action is brought—
Quære.

The Counsel in the cause requested the opinion of the Court, whether, on the common counts, this amount of interest could be recovered? as it did not appear, that any thing had been done by the commissioners on the subject.

ABBOTT, C. J.—I think, in order to charge a man with interest, at *20l. per cent.* there should be a count framed upon the act. If, indeed, it applies to the case of an action, and is not merely directory as to what is to be done, when the matter is before the commissioners, I should think it a case for *5l. per cent.* interest. But this interest at *20l. per cent.* is in the nature of a penalty; and I think you must declare specially, as for a penalty. If the commissioners had settled an account, and charged the defendant with such interest, then the case would have been different.

A verdict was then taken for the plaintiff, for the principal sum, subject to a motion to augment

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 BERESFORD
 v.
 BIRCH.

it, by adding the interest at 20*l. per cent.* But no motion was made in the subsequent Michaelmas Term.

F. Pollock, for the plaintiff.

Parke, for the defendant.

[Attornies—*Leigh* and *Hurd & J.*]

This action was brought on the statute, 49 Geo. 3, c. 121, sec. 4, which enacts, that “in all cases “in which any assignee or assignees of any bankrupt’s estate, “shall wilfully retain in his or “their hands, or otherwise employ for his or their own benefit, “any sum or sums of money; part “of the estates of such bankrupts,” contrary to the directions of the 5 Geo. 2, c. 30, or of this act, “he or they shall be charged in “his or their accounts with the “estates of such bankrupts, with “such sum or sums of money as “shall be equal to the amount of “interest, computed at the rate “of 20*l. per centum, per annum*, “on all such sums of money, so “retained or employed by him or “them; for the time or times “during which he or they shall “have so retained or employed “the same, contrary to the said “direction of either of the said “acts: and the commissioners of “bankrupts are hereby required to “charge such assignee or assignees, “in their accounts, with such sum “or sums of money accordingly.”

The foregoing enactment is repealed by the stat. 5 Geo. 4, c. 98,

which passed to consolidate the bankrupt laws. It may therefore be proper to state the section of that statute, which regards cases of this kind.—5 Geo. 4, c. 98, sec. 99, enacts, “that if any assignee “shall retain in his hands, or employ for his own benefit, or “knowingly permit any co-assignee so to retain or employ, any “sum to the amount of one hundred pounds or upwards, part “of the estate of the bankrupt, or “shall neglect to invest any money “in the purchase of Exchequer bills, when so directed, as aforesaid, (by the commissioners,) “every such assignee shall be “liable to be charged in his accounts with such sum as shall “be equal to interest at the rate “of 20*l. per cent.* on all such money, for the time during which “he shall have so retained or “employed the same, or permitted “the same to be so retained or “employed, as aforesaid, or during which time, he shall have “so neglected to invest the same “in the purchase of Exchequer bills; and the commissioners “may charge every such assignee “in his accounts, accordingly.”

Though these two enactments are in many respects the same, yet there are some very important differences, which made it necessary to state both. The statutes repealed by the 5 Geo. 4, c. 98, are:—34 & 35 H. 8, c. 4; 13 Eliz. c. 7; 1 Jac. 1, c. 15; 21 Jac. 1, c. 19; 13 & 14 Car. 2, c. 24; 10 Ann. 15; 7 Geo. 1, stat. 1, c. 31; 5 Geo. 2, c. 30; 19 Geo. 2, c. 32; 24 Geo. 2, c. 57, sec. 9 & 10; 4 Geo. 3, c. 33; 36 Geo. 3, c. 90, sec. 1 & 2; 37 Geo. 3, c. 124; 45

Geo. 3, c. 124, sec. 1 & 8; 46 Geo. 3, c. 135; 49 Geo. 3, c. 121; 56 Geo. 3, c. 137; 1 Geo. 4, c. 115; 3 Geo. 4, c. 74; 3 Geo. 4, c. 81: and, instead of these, new provisions are enacted in this statute, which consists of 133 sections: but this act is not to come into operation, till the 1st of May, 1825, except that certificates of persons becoming bankrupt before this act, or before that day, “shall take effect upon the “passing of this act.”

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BERESFORD
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PETER v. HANCOCK.

July 29th.

THIS was an action against the defendant, for criminal conversation with the plaintiff's wife.

The executor of the defendant's uncle was called to prove the defendant's situation in life; and he stated, that the defendant was a wholesale grocer, in an extensive way of business, and that he believed him to be in good circumstances. He was then asked what property the defendant acquired on the death of his uncle. He appealed to the Court, to say, whether, as an executor, he was bound to answer questions concerning his testator's property.

On an inquiry in an action for crim. con. into the circumstances of the defendant, the executor of a deceased relation is bound to answer a question, which requires him to state the amount of property the defendant acquired under the will of his testator.

ABBOTT, C.J.—I cannot see any reason why you should not answer this question. I do not say that an executor is bound to answer all questions; but there is no reason, why you should not answer this; and therefore you must answer it.

Scarlett, Campbell, and Brougham, for the plaintiff.

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v.

HANCOCK.

The *Attorney General*, the *Common Serjeant*, and
Ryan, for the defendant.

[Attornies—*Nind & C.* and *Gatty & Co.*]

July 29th.

PARKINS and Another v. MORAVIA.

Whether an undertaking to pay the plaintiffs the amount due from defendant to Mr. B., for work to be done by Mr. B., in consideration that plaintiff will advance money to Mr. B. is a guaranty?—*Quere.*

Whether an agreement in a series of letters, containing less than 1080 words, requires a stamp of 1l. 15s.—*Quere.*

THE declaration stated, that, in consideration that the plaintiffs would discount a bill of exchange for 1200l. for a person named Benjamin, the defendant undertook to pay them such sum of money as should be due from him to Benjamin, for work done within a specified time. The undertaking was as follows:—

“3, Old London-street, 3rd June, 1822.

“Messrs. Parkins & Co.

“Gentlemen,

“I engage to pay you the amount which shall
 “be due from me to Mr. Benjamin, for any work he shall
 “do for me, between this and Christmas next.

“Gentlemen,

“Your’s most truly,

“George Moravia.”

Underneath it was the following letter—

“Sir,

“By the enclosed note, you see Mr. Parkins’s
 “conditions, you will therefore, if you think proper, sign
 “the above note to them.

“I am, Sir,

“Your’s very respectfully,

“Nathaniel Benjamin.

“Addressed to George Moravia, Esq.”

The note enclosed was in these terms—

“ Mr. Benjamin,

“ Sir,

“ We shall be willing to assist you to the
“ amount proposed, if Mr. Moravia will take the trouble
“ of writing us a line, to say, that the money he will have
“ to pay you for work to be done to Christmas shall be
“ given us.

“ We are,

“ Your humble servants,

“ June 3rd, 1822.

“ Edward Parkins & Co.”

The charge for work done, was £450.

The *Attorney General*, for the defendant, contended, that this was a guaranty, and therefore within the Statute of Frauds; and if so, the consideration was not set out in the writing itself, nor in any paper referred to by it: and he cited *Boydell v. Drummond*, 11 East, 142.

Purke, for the plaintiff, cited *Wilson v. Coupland*, 5 B. & A. 226; and argued that it was an assignment of a debt in action.

Amory, C.J.—It is an assignment of a thing not in *ex. Wilson v. Coupland* is not like this case (a): you must show on the agreement what the nature of the thing to be performed is, and what the consideration for it.

Stewart, for the plaintiff. It is an original contract.

Where the joint debt was created, and the defendants demanded of T. & Co. and in consequence of an assignment was made, defendant should pay to T. & Co. the debt due from T. & Co. It was said that as

the demand of T. & Co. on the defendants was for money lent and received, the joint debt was created in receipt, as a receipt for money lent and received, against the defendants.

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"I undertake to pay you such money as shall be due,"
 and does not come under the Statute of Frauds.

ABBOTT, C. J.—It is to go to reduce the bill, and therefore it is to answer for the debt of another.

Scarlett. That is the effect of it, but not the contract.

ABBOTT, C. J.—Then, if you take it so, being on the discount, it would be usurious.

Scarlett. This is an undertaking by the defendant, to pay the debtor's money, and not to be answerable out of his own funds, therefore the object of the Statute of Frauds has no existence here.

Another question was then raised, as to the amount of stamp-duty required, and a verdict was taken for the plaintiff, subject to the two points of law, in order that the opinion of the Court above might be had on them, on motion to enter a nonsuit.

Scarlett and Parke, for the plaintiffs.

The *Attorney General*, for the defendant.

[Attornies—*Deane and Swaine & Co.*]

BEFORE ABBOTT, C. J. BAYLEY, HOLROYD, & LITLEDALE, J.

In Bank.

Nov. 9th.

The *Attorney General* moved to enter a Nonsuit, pursuant to the leave granted at the trial, and contended that the engagement was to pay the debt of another, and therefore the consideration must be set out according to the case of *Wain v. Warlters*, 5 East, 10; and that, if

consideration is mentioned in one paper, and the contract is on another, unless there is a clear reference, it will not be sufficient, *Boydell v. Drummond*, 11 East, 142. The words of the Statute of Frauds are as general as they can be; and the circumstance, that the debt is to be paid out of a particular fund, can make no difference.

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and Another
v.
MORAVIA.

ABBOTT, C. J.—You objected at the trial, to the stamp, as well as on the Statute of Frauds.

The *Attorney General*. Yes, my Lord, if an agreement is contained in a series of letters, one letter only may be stamped; but I contend, that, under the words of the Stamp Act (a), the stamp must be 1*l.* 15*s.* and not 1*l.*

LITLEDALE, J.—Do the letters contain altogether more than 1080 words; for if they do not, it will be a question whether the 1*l.* stamp is not as much as is required.

The *Attorney General*. My Lord, the letters do not contain more than 1080 words; but I contend, that, on the wording of the Stamp Act, the 1*l.* 15*s.* stamp is still necessary.

The Court intimated that they would grant a rule to

(a) The Stamp Act, 55 Geo. 3, c. 184, under the title, Agreement, in the Schedule, part 1; after stating that any agreement under hand only, where the same shall not contain more than 1080 words, shall have a stamp of 1*l.* and where it shall contain more than such number of words, it shall have a stamp of 1*l.* 15*s.*, and for every entire quantity of 1080 words over and above the first, a further progressive duty of 1*l.* 5*s.*

proceeds as follows:—“ Provided
“ always, that where divers letters
“ shall be offered in evidence to
“ prove any agreement between
“ the parties who shall have writ-
“ ten such letters, it shall be suf-
“ ficient if any one of such letters
“ shall be stamped with a duty
“ of 1*l.* 15*s.* although the same
“ shall in the whole contain twice
“ the number of 1080 words, or
“ upwards.”

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PARKINS
and Another
v.
MORAVIA.

shew cause, but suggested that it would be better to raise the questions on a special case. The parties adopted the suggestion. The special case has not yet been argued.

July 29th. MILLIKIN, Assignee of DE MEILLHEIM, a Bankrupt, v.
BRANDON.

If it is proved in an action by assignees, (where the trading comes in question), that the bankrupt bought, and represented himself, as a dealer, and offered goods in exchange; though there is no distinct proof of his ever having sold, it is not ground of nonsuit, but ought to be left to the jury. But if there be distinct proof, that he bought in connection with others, to carry on a system of fraud, by making away with the goods, and never selling any of them, it is not a trading within the bankrupt laws; and the Judge will nonsuit the assignees.

TROVER for a quantity of swords.

It was proved that the bankrupt ordered goods, as he stated, for the purpose of sending abroad; and he said, that he would give other goods in exchange for them.

Marryatt, for the defendant, submitted that this did not constitute proof of trading; it was proof of buying, but not of buying and selling; and if this evidence was sufficient, it would be making a man a trader by his declarations, and not by his acts.

ABBOTT, C. J.—I cannot say that, if a man buys, and represents himself as a dealer, and offers goods in exchange, that he does not buy to sell again. At least, I must leave it to the Jury, I cannot nonsuit upon it.

It appeared afterwards from the evidence on the part of the defendant, that the bankrupt ordered the goods in question, in this cause, for the purpose of sending them to Cadiz. He was to pay for them in bills at two or three months, at the banking-house of Cox & Biddulphs.

The bankrupt's brother stated, that he was almost sure that his brother never had any correspondence with Cadiz. That he had seen large quantities of goods come by waggon to his brother's in the morning, which were carried away in the night in hackney coaches; and that he was not

able to swear that he ever saw his brother sell any thing. It also appeared that at the time of the ordering of the goods, his account at the banker's was overdrawn, and never was in credit afterwards.

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MILLIKIN,
Assignee of
DE MEILL-
HEIM, a bank-
rupt,
v.
BRANDON.

ABBOTT, C. J., upon this, observed—there is no evidence that this person was buying and selling goods. If he was buying in connection with others, to carry on a system of fraud, it is not a trading to bring him within the bankrupt laws.

Scarlett, for the plaintiff, then elected to be

Nonsuited.

Scarlett, for the plaintiff.

Marryatt and Gurney, for the defendant.

[Attornies—*James Taylor and Rogers & Son.*]

GALE v. DALRYMPLE.

July 31st.

ASSAULT and false imprisonment.

The defendant pleaded, 1st. the general issue—Not guilty; and 2nd, that he was master of a ship called the *Van-
start*; of which the plaintiff was a mariner, and that the plaintiff misconducted himself, and was riotous and drunk; and in consequence, he, the defendant, caused him to be put in irons, and to be moderately chastised. Replication, that the defendant committed the acts complained of, of his own wrong, and without the causes assigned.

In assault and battery and imprisonment, the defendant justifies the whole as master of a ship, in which the plaintiff was a sailor, and refractory; and the plaintiff replies *de injuria*. If, by the evidence, it appears that the

defendant improperly knocked the plaintiff down, in addition to putting him in irons, the plaintiff cannot recover: as, if he meant to admit that all was proper except the knocking down, and to proceed for that only, he should have new assigned.

1824.

GALE

v.

DALRYMPLE.

In addition to proof of putting in irons and flogging it appeared in evidence, that the defendant knocked the plaintiff down while he was in a boat going from another ship to his own, just previous to the imprisonment complained of, and for the same cause.

Gurney, for the plaintiff, submitted, that the justification did not go to that part of the complaint.

ABBOTT, C. J.—If the plaintiff meant to acknowledge that the whole was proper except the knocking down in the boat, he ought to have new assigned. The justification applies to the whole.

Verdict for the defendant.

Gurney and *E. Lawes*, for the plaintiff.

Scarlett and *F. Pollock*, for the defendant.

[Attornies—*Flower* and *Gordon*.]

July 31st. HALL and Another, Assignees of HARRIS, a Bankrupt, & BARNARD and Others.

The Assignees of a bankrupt may maintain trover for bills of exchange sent by him to one of his creditors after committing an act of bankruptcy, though he being a bill broker had merely lent money on them, and had not either discounted, or given the full value for them.

TROVER to recover certain Bills of Exchange.

The bankrupt was a bill-broker, and the defendants were bankers. The bankrupt, after he had committed an act of bankruptcy, had sent these bills to the defendants, who were creditors; but it appeared, that the bankrupt had only lent money on some of the bills, and had not either discounted or paid the full value for them.

Marryatt, for the defendants, contended, that these were

not his property, so as to enable the assignees to maintain trover for them.

ABBOTT, C. J.—He has a *lien* on them to a certain extent, which passes to the assignees, and enables them to recover the bills from a wrong doer. Whether they can keep the whole amount, is quite another thing.

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HALL
and Another,
Assignees of
HARRIS,
a Bankrupt,
v.
BARNARD
and Ors.

Verdict for the plaintiffs.

The *Attorney General*, the *Common Serjeant*, and *Holt*,
for the plaintiffs.

Marryatt, for the defendants.

[Attornies—*Hartley* and *Parnell*.]

Trover is maintainable against strangers by a person who has only a special property in the goods, as by carriers or bailees, *Arnold v. Jeffreson*, 1 Ld. Raym. 275; or by the finder of a jewel, the real owner being unknown, *Amory v. Delamires*, 1 Str. 505; or by a person having a temporary property in the goods, *Roberts v. Wyatt*, 2 Taunt. 268: and in *Webb v. Fox*, 7 Ter. Rep. 396, Lord KENYON lays down, that a special property in the case of personalty may be in one, as in the instance of

carriers, while the absolute right to it may exist in another; when a competition arises between those two persons, the right of the latter must prevail; but as against all other persons a special property is sufficient. In that case, an uncertificated bankrupt had brought trover for goods acquired by him since his bankruptcy, and which he had been possessed of without denial of his assignees; and the Court held the action to be maintainable.

1824

COURT OF COMMON PLEAS.

Sittings at Guildhall, in Trinity Term, 1824:

BEFORE LORD CHIEF JUSTICE BEST.

June 24th.

HAMOND v. HOLIDAY.

If the duties of a sworn broker are executed in such a manner that no benefit results from them, he is not entitled to recover either his commission or even a compensation for his trouble.


ASSUMPSIT by the plaintiff, a sworn broker, against the defendant, a part owner of a vessel called the Traveller, for his commission.

The plaintiff's clerk proved that he saw the defendant repeatedly about getting the Traveller chartered, through a Mr. Lancaster. He shewed the defendant a former charter party, which he read, and the defendant said he had no objection to go on the same terms, but he would see the plaintiff on 'Change about it. The defendant signed the following paper, as did also Mr. Lancaster.

“ The Traveller, 264 tons, will proceed from hence to
 “ Pernambuco or Bahia, both or either, taking out goods
 “ freight free, the parties paying the charges. To sail on or
 “ before the 10th of March.”

The witness further stated, that he saw the defendant afterwards, and asked him if he had got fixed, and he said “yes;” upon which bills were printed. The witness, the day after this interview, went to him, and asked him, why he did not bring the papers to get the ship entered? He said, he should not go, he had got a better charter. The witness told him he had signed the agreement. He replied it was not binding, because it was not on a stamp. The witness saw him again the day following, and on his saying that he could not go unless the Consulage was

paid, told him that the plaintiff would pay it out of his commission, if there was no other difficulty.

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 HAMOND
 v.
 HOLIDAY.

Lancaster was then called, and stated, that he signed the memorandum on the faith of the broker's saying that the other terms of the charter party, shewn to the defendant, would be complied with; that there was a difference between him and the defendant on account of the latter refusing to pay the consular charges on the home cargo; (the witness being liable to pay all the charges of the outward cargo, because he was to pay no freight); and that the defendant denied at first having seen the charter party referred to; but afterwards, in consequence of the plaintiff's assertion, acknowledged that he had seen it.

BEST, C. J.—How can we judge what the terms are, unless from the signed paper; and it is there stated, “the charges” are to be paid; that must be, all the charges.

Pell, Serjt. The paper was signed after the view of the charter party. The broker shewed the charter party to the defendant.

BEST, C. J.—The broker should have specified it. I think the plaintiff is entitled to nothing.

Pell, Serjt. I submit, that he is entitled to his commission.

BEST, C. J.—No: not when the bargain goes off.

Pell, Serjt. then cited the case of *Haines v. Brisk*, 5 Taunt. 521 (a), on the part of the plaintiff.

(a) Reported also 1 Marsh. Rep. 191. In that case the broker had obtained the voyage he was employed to procure for the ship, and the defence was, that he ought not to be paid his commission, be-

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 HAMOND
 v.
 HOLIDAY.

BEST, C. J.—That is a very different case from the present. The only point there was, whether the voyage could be legalized. In this case, the defendant says, the plaintiff has made such a bungling bargain, that he is not entitled to recover. The law, as it relates to commission, I take to be this—a man must complete the thing required of him, before he can be entitled to charge for it: but although he does not do the whole, yet he may be entitled to remuneration in proportion to what he has done.

A witness then proved, that, according to the usage of trade, when a memorandum has been signed by the charterer and ship-owner, and the arrangement is put an end to by the act of the ship-owner, the broker not being the cause in any way of its not continuing, the broker in such case is entitled to his commission. But this witness admitted, on cross-examination, that, in order to entitle him, it is necessary that the spirit of the charter should have been actually agreed upon.

Vaughan, Serjt. for the defendant. The plaintiff is not entitled to one farthing from the defendant. He is employed by Lancaster, and may be entitled to something from him, but not from the defendant.


Lancaster was here re-called, and said, that the employment was as much by the defendant as by him; but that, under no circumstances, did he (Lancaster) pay commission.

Vaughan, Serjt. If the matter had been fully settled, the defendant would be liable, but otherwise the

cause that voyage would be illegal, unless certain licences were obtained. This defence, of course, did not avail the party any thing, because the Court considered that

the broker had done all that he was employed to do, and was entitled to be paid for his services. See *Money Penny v. Hartland & Others*, ante, p. 352.

plaintiff is entitled to nothing, for it is upon the work being done that he has a claim to be paid. The paper signed is nothing but a loose memorandum, which ought to have been reduced into an intelligible and binding document.

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 HAMOND
 v.
 HOLIDAY.

BEST, C. J.—Certainly, there is some evidence, that, though a ship is not chartered, yet, if the ship-owner be entirely in fault, commission should be paid; but that is not the question here. It would be absurd to give a commission on 15,000*l.* or 16,000*l.* for doing almost nothing. It is the broker's duty to draw up the bargain intelligibly; and if he does not, he is entitled to nothing. I agree with the law laid down in the case cited; there the contract was clear and intelligible; and the broker was allowed a compensation, he having done all that he was bound to do. But has this broker done all that he was bound to do? Is this an intelligible paper? It is said that another charter party was shewn to the defendant, which explains it. This is not the way in which business ought to be done. The terms should be put down intelligibly by the broker, and if they are not, his charge is made for introducing confusion, and leading the parties into law-suits. It is quite clear, that no charter party could have been made out from this paper. If the defendant has received advantage from the acts of the broker, then the verdict should be for the plaintiff, with proportionate compensation; but if the business has been performed in so slowly a manner, that no advantage has been derived from it, then the verdict must be for the defendant.

Verdict for the defendant.

Pell, Serjt. and *Campbell*, for the plaintiff.

Vaughan, Serjt., for the defendant.

[Attornies, *A. Mitchell* and *Reardon & D.*]

1824

July 9th.

Sittings at Guildhall, after Trinity Term.

BEFORE LORD CHIEF JUSTICE BEST.

GALE v. WELLS.

If a broker makes a contract with the defendant for the purchase of goods, and delivers, by mistake, a bought note to each party, and does not mention his principal's (the buyer's) name, but makes a proper entry of it in his book. Held, that the buyer may maintain an action for the breach of this contract.

ASSUMPSIT to recover damages for the breach of the following contract.

“ London, 28th October, 1823.

“ Bought of Mr. H. Wells, from 40 and not exceeding
 “ 50 tons of Cam-wood, at 12*l.* per ton in bond, to be
 “ paid for at the landing weight, to be brought in the
 “ return voyage of the Hetty. Memorandum—The Hetty
 “ cleared out for her outward voyage on the 26th instant.”

A broker named Hooper was called, who proved that he made the contract on the behalf of the plaintiff, and delivered a copy of that produced to the defendant; that he wrote the contract on the defendant's counter, on two half-sheets of paper, and left one with the plaintiff as he went home. On his cross-examination, he admitted, that he did not mention the name of the plaintiff to the defendant, nor could he positively tell whether the defendant knew that he was a broker, but he stated that very few bargains (if any,) of such a description, are made without a broker; and that, from the circumstance of his having left the note, he presumed the defendant must be aware of the capacity in which he acted.

It appeared that the broker delivered *bought* notes to both plaintiff and defendant, and he could not account for his having done so. The broker's book was produced, in which was an entry of the contract on the day on which it was made; which entry was in the proper form.

A witness proved that he went to the defendant, and shewed him the contract, required him to fulfil it, and

tendered him the price of 40 tons at 12*l.* per ton, *minus* the discount; on which the defendant said, that he knew nothing about it.

The Captain of the Hetty was called, and proved that he brought home only 19 tons of Cam-wood; that he had stowage for more, and had no doubt he could have got more by paying a higher price.

A letter, dated the 19th November, 1822, written by the defendant to the Captain, was read. It stated that he left it to the option of the Captain to do as he pleased about the quantity of each article he was to bring, according as he might find it likely to be profitable. It contained also this observation, "I told you I could make a certainty of 10*l.* a ton for Cam-wood."

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Wilde, Serjt., for the defendant. The contract left with my client is that by which he is to be bound, and that is only a contract between Hooper and the defendant; and it is not competent to Hooper, by delivering a paper to some one else, to introduce a new person, that he himself may be a witness instead of a plaintiff. The contract delivered to the defendant is not as it ought to be, a sold note—"Sold for you to Mr. Gale," but it is, "Bought of Mr. H. Wells." This would have been the form of the contract, if the sale were to Hooper personally; and he cannot, under such circumstances, be received here to make out a case by his testimony. There is no contract between the plaintiff and defendant. There is no demand of commission at the time of making the contract, nor till after the bringing of the action. He cited the case of *Champion v. Plummer*, 1 N. R. 252; and called a person, who proved that the Cam-wood was sold at 15*l.* per ton; but he admitted, on his cross-examination, that it was damaged by some palm-oil brought over with it: and it appeared, from the evidence of one of the plaintiff's witnesses, that good marketable Cam-wood, sold at the time when this should have been delivered, for 16*l.* a ton.

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BEST, C. J.—It appears to me, that the plaintiff is entitled to 4*l.* *per* ton, being the difference of price on 40 tons. I am of opinion (but that is rather matter of fact for the Jury), that the delivery of the note intimated that the defendant was dealing with a broker, who must be taken to have been acting for some principal, because a broker cannot, without violating his oath and the law, act in any other capacity. If the defendant doubted whether he was dealing with a broker, he ought to have asked the question. There is no objection, in point of law, to the broker's concealing the principal's name. I am also of opinion, that the circumstance of both being bought notes does not vacate the contract. The note is a proper note, it is "Bought of you." But it is said, this is a fraud upon the defendant. The broker is directed by law to keep a book, and make entries day by day. We have the book here, which is free from the error spoken of. The broker swears the entry was made on the day when the transaction took place. The broker swears he made a contract on the 28th of November, which has been clearly broken. The case of *Champion* and *Plummer* decides that, where the contract is with principals, both must sign, and it is said the defendant refused to sign. But such is not the nature of the transaction. The words of the contract shew that it was final and binding. The defendant should have returned the paper, if he meant to insist upon its being of no effect, but he does not do so: and the letter to the Captain is consistent with the fact of a bargain having been made. With respect to the quantity, my construction of the contract is, that the defendant was bound to get Cam-wood to the extent of 40 or 50 tons, if he could, whatever the price might be, because he takes the chance of that, and the Captain proves that more might have been obtained. I think the defendant must be held to be liable to the extent of 40 tons. And then, with respect to the price, the wood brought over actually sold at 15*l.* *per* ton; but it appears that it was injured by palm-oil brought over with

it; and it is in evidence that good marketable Cam-wood sold at the time for 16*l*. I am, therefore, of opinion, that the plaintiff is entitled to recover at the rate of 16*l*., for it is the defendant's duty to shew that the damage was not occasioned by his fault.

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During the deliberation of the jury, *Wilde*, Serjt. tendered a bill of exceptions, and made the three following points:

1*st*. That the contract by which the defendant was bound was that delivered to him, which was a contract between him and Hooper, and that it was not competent to vary it by introducing Gale. .

2*nd*. That there was no evidence to be left to the jury to say whether the defendant knew that Hooper was acting as a broker. And

3*rd*. That there was no claim in the declaration for these differences of price; for it only stated that the defendant sold certain Cam-wood which he refused to deliver.

Verdict for the plaintiff—Damages, 160*l*.

Vaughan, Serjt. and *Abraham*, for the plaintiff.

Wilde, Serjt., for the defendant.

[Attornies—*Brooking* and *Smith*.]

The case of *Champion & Another v. Plummer*, 1 N. R. 252, was an action for not delivering a quantity of treacle, bought by the plaintiff of the defendant; the bargain was made by the plaintiff's clerk with the defendant, and a memorandum was made by the plaintiff's clerk, viz. "Bought of W. Plummer, 20 puncheons of treacle, 37*s*. to be delivered by 10th of December.

(Signed) "W. Plummer."

It was objected that this was not a sufficient note or memorandum within the statute of frauds, as it was not signed by the purchaser; and the Court of Common Pleas held that this was not a sufficient memorandum of a contract, as it did not state who were the contracting parties, and would prove a sale to any other person as well as the plaintiffs. The case of *Heyman v. Neale*, 2 Camp. 337, decides, that where the broker was

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agent for both parties, the entry made by the broker in his book, signed by him, is the binding contract; and is equally binding, whether he sends bought and sold notes to his employers or not; such notes being merely to apprise the parties of the terms of the contract so made. But the case of *Wright v. Dannah*, 2 Camp. 203, decides, that the agent of a party must be a third person, and that one contracting party cannot sign the contract as agent for the other. In *Thornton & Others v. Kempster*, 5 Taunt. 786, it was held, that, if a broker, who is agent for both parties, delivers to them notes describing the goods differently, no contract arises. And in *Powell v. Divet*, 15 East, 29, it was held, that if the

broker make a material alteration in the sale note given to one after he has delivered the sale note to the other, the one who procured his sale note so altered, cannot sue on the contract evidenced by it. In *son v. Davies*, 2 Camp. 530, held, that the custom in the City of London, that, if a broker delivers goods to be paid by a bill of exchange, the vendor had a right to sue on the contract, if not satisfied with the buyer's sufficiency, was reasonable and valid; but that the vendor must intimate his dissent soon as he has an opportunity of inquiring into the solvency of the purchaser; and five days was considered too long for that purpose.

July 9th.

SEWELL v. CORP.

The certificate of the veterinary college, that the plaintiff had attended lectures there, is not admissible in evidence, as not coming from a body known to the law. If there is a general usage applicable to a particular trade or profession; persons employing one in such trade or profession will be taken to have dealt with him, according to that usage; but a usage for a veterinary surgeon to charge for his attendances, when there was not much medicine required, is too uncertain.

ASSUMPSIT, by a veterinary surgeon, for attendance and medicines furnished to the defendant's horse.

A certificate of the plaintiff's having attended lectures at the Veterinary College, signed by Mr. Coleman, professor there, and several others, was tendered in evidence on the part of the plaintiff.

BEST, C. J.—Refused to receive it, on the ground, that it did not come from any public body known to the law.

Mr. Coleman was called as a witness, and asked by the plaintiff's counsel, whether, to his knowledge, it was

the usual practice of a veterinary surgeon to charge for his attendances, when there was not much medicine required, is too uncertain.

custom to pay veterinary surgeons for attendance as well as medicines?

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Vaughan, Serjt. objected. There can be no custom; this is all modern.

BEST, C. J.—They do not mean a custom whereof the memory of man runneth not to the contrary; but if there is a general usage applicable to a particular profession, parties employing an individual in that profession are supposed to deal with him according to that usage. You may cross-examine as to the extent of the usage. With respect to veterinary surgeons, I know of no law that applies to them particularly. If there is no contract, they must go on a *quantum meruit*. There is a usage for a broker to have commission. If there is a usage here, it is evidence to regulate the claim. I see no objection to the general question as proposed.

Mr. Coleman then stated that the general rule was, to charge for attendance, when there was not much medicine required.

BEST, C. J.—Such an usage as this is too uncertain.

The plaintiff then went on a *quantum meruit*, and proved several attendances.

Vaughan, Serjt. contended, that by analogy to the case of apothecaries, the jury could not legally give any thing for attendances.

The sum of 1*l.* 12*s.* 6*d.* for the medicines furnished, had been paid into Court.

BEST, C. J.—Left it to the jury to say, whether that

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sum was or was not sufficient for the plaintiff's services and medicines.

Verdict for the plaintiff.—Damages 17s. 6d.

Pell, Serjt. for the plaintiff.

Vaughan, Serjt. for the defendant.

[Attornies—*Thomson* and *Marson*.]

See *Wood v. Wood*, ante, page 59.

July 9th.

BOWEN v. PARRY and Others.

In assault, where there is a justification of *molliter manus* to all the counts in the declaration, the plaintiff cannot be admitted to prove excess, unless he has new assigned: otherwise where there is a justification pleaded to one count, and the general issue to another: and the words in the plea of *molliter manus*, "as was lawful for the cause aforesaid," do not allow the plaintiff to recover on the general replication, on the grounds of excess in the defendant.

ACTION for an assault against three defendants. Pleas—the general issue; and a justification, of "*molliter manus*;" the plaintiff having misconducted himself in the house of the defendant Parry, and the other defendants being his servants, acting under his authority.

The justification was to all the counts: Replication—*De injuria*.

The defendant having made out the justification, the plaintiff was proceeding to prove excess.

Vaughan, Serjt. for the defendant, submitted, that this could not be done, there not being any new assignment.

Pell, Serjt. for the plaintiff, observed, that that was by no means clear. Doubts had been entertained by many in the profession, on account of the words used in the justification: viz.—"As was lawful for the cause aforesaid."

. J.—I take the rule to be this: If there are counts in the declaration, and to one there is a justification, and to the other the general issue, a new assignment is not necessary; but, in this case, the justifications to every count, therefore I think a new assignment is necessary. I should have no objection to the point being discussed in the Court above; but I think that the words quoted let the party in to discuss, without a new assignment. I remember, at Chelmsford, I had considerable doubt about the point, and I then gave my opinion as I do now, strengthened in that opinion, by finding that no motion afterwards on the subject.

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Verdict for the defendant.

Serjt. and *F. Pollock*, for the plaintiff.

Serjt. and *Wilde*, for the defendant.

[Attornies—*Gray* and *Brough*.]

There have been two assaults, one justifiable, and the other not, if a justification is pleaded. The plaintiff should new assign to both counts if there were two such counts, and to both the counts if one is pleaded, and the plaintiff need not new assign to the first count only, if he pleads the assault in the second count. *Atkinson v. Matthe-son*, 177. And in *Barnes v.*

Hunt, 11 Ea. 451, where the plaintiff declared for several trespasses committed on several days, and the defendant pleaded a licence, the plaintiff replied *de injuria*; it was held, that the defendant must show a licence for each act of trespass proved by the plaintiff, and the plaintiff need not new assign, though the defendant could prove a licence for the trespasses committed on some of the days.

1824.

Sittings at Westminster after Trinity Term.

BEFORE LORD CHIEF JUSTICE BEST.

July 19th.

WICKES v. GOGERLY.

A security given in lieu of a former security, which was tainted by usury, is void; unless in the second security, a deduction is made of all sums paid usuriously, under the former security.

THIS was an action to recover certain instalments due on an agreement. The defence was usury.

The agreement was dated the 12th of May, 1821. It recited a warrant of attorney, executed by the defendant, and a discharge under the Insolvent Debtor's Act, and a subsequent agreement to pay by instalments a sum of 110*l.* for principal and interest mentioned in the schedule.

Pell, Serjt., for the defence, called a Mr. Taylor, an attorney, who said, that, early in the year 1818, the defendant was indebted to him in upwards of 100*l.* which he was desirous of getting paid; and, in consequence, Wicks, the plaintiff, was applied to, and agreed to lend the defendant 100*l.* for which he was to receive 5*l.* for three months. Taylor was the defendant's attorney, and an account delivered by him to the defendant was read, in which were two items clearly shewing a payment on behalf of defendant to plaintiff in the latter part of 1818, and the beginning of 1819, at the rate of 10*l. per cent. per annum.* A letter also, in the handwriting of the plaintiff, dated 27th of August, 1820, was put in and read. It mentioned more than 5*l. per cent.* interest, but required, as a security, a policy of insurance on the life of the defendant: and certain bills of exchange were put in evidence to identify the security sued on, with the original transaction.

The witness Taylor, on his cross-examination, stated, that when the letter of the 27th of August was sent, the transaction was considered an annuity transaction, and a deed had actually been prepared and engrossed by defendant's own son, which, however, defendant refused to

execute. But he could not take upon himself to say, that *before the first payment*, it was considered an annuity transaction.

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Vaughan, Serjt. for the plaintiff. There is no usury made out. This is an imputation not to be cast by conjecture; there must be clear and satisfactory evidence on the subject. The circumstance of the letters requiring a policy on the life, shews that it was an annuity transaction. The plaintiff is not seeking to recover on the original security, but stands on a fresh agreement: and he cited the case of *Barnes v. Hedley*, 2 Taunt. 184.

BEST, C. J.—The plaintiff's letter confirms the testimony of Taylor, and there is no doubt the transaction originated in usury. Then comes the question, whether the original usury taints this agreement? To make it do so, it must appear that this is a substituted security for the prior: the recital in the agreement of what took place in 1818, shows this clearly. I quite agree with the doctrine to be found in the case of *Barnes v. Hedley*; and I wish I could apply it to this case. If this security is a substituted security, and stands for usury, it is void. In this case there is no purging of the transaction, as there was in *Barnes v. Hedley* (a). To bring it within that case, a deduction should have been made from the sum mentioned in the agreement, of such part of it as would refund the sum which was paid for usurious interest. It appears from the bills, to be the same security, and from the evidence of the witness and the plaintiff's letter, it is clear that usurious interest was taken, which has not been deducted. With respect to the draft of the annuity deed, said to have been prepared, it is quite absurd to talk of

(a) The case of *Barnes v. Hedley*, 2 Taunt. 184, decides that after usurious securities given for a loan have been destroyed by mu-

tual consent, a promise by the borrower to repay the principal and legal interest is binding.

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it, for we are not to consider what the parties intended to do, but what they really did.

Verdict for the defendant.

Vaughan, Serjt. and *Chitty*, for the plaintiff.

Pell, Serjt. for the defendant.

[Attornies—*R. Hill* and *Davison*.]

July 12th.

HASLAM, Administrator of PLAISTOW, v. DIGGLES.

If a bond to secure an annuity, contain a recital of the payment of the consideration, and the annuity has been paid for several years, the actual payment of the consideration will be presumed, though there be no receipt indorsed, and though the subscribing witness have no recollection of the subject.

DEBT on a bond for securing the payment of an annuity.

The only disputed point in the case was, the payment of the consideration. The bond was executed in 1801.

The execution was proved by the attesting witness, an attorney; who, on being questioned on the part of the plaintiff, as to the payment of the consideration, said, that he had no distinct recollection at such a distance of time, whether it was paid in his presence or not, but he had no doubt of its having been paid. He also stated, in answer to questions put by the defendant's Counsel, that, with respect to common bonds, it was not usual to put a receipt for the consideration on the back; but admitted, that he was not very well acquainted with the practice, as to annuity bonds.

The death of the grantee in 1820, and the payment of the annuity for a considerable period, were proved.

The bond recited the payment of the consideration.

Vaughan, Serjt. for the defence, submitted that there ought to be distinct proof of the actual payment of the money.

Taddy, Serjt. for the plaintiff, contended, that the circumstance of the annuity's having been regularly paid

for so long a period of time, was sufficient evidence that the consideration had been paid. He cited the cases of *Poole v. Cabanes*, 8 T. R. 328, and *ex parte Maxwell*, 2 East, 85; and argued that the principles laid down by Lord KENYON, in the latter case, were decisive upon the point in dispute in this; and that much mischief would result to society if it were allowed, at such a distance of time, to rip up such transactions.

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BEST, C. J.—I have no difficulty in telling the jury, that there is abundant evidence, from which they may presume the payment of the consideration. The attesting witness saying he has no doubt that it was paid, is certainly not evidence; but there is evidence of the payment of the annuity for a considerable time, and it cannot be reasonably supposed, that the annuity would have been paid for so long a time, if the consideration had not been received. The party, by each succeeding payment, has been giving evidence against himself. It is said, by the Counsel for the defendant, that there should have been a receipt for the consideration, indorsed on the bond. But it is not usual to indorse such receipt, except on deeds, and even there it is not necessary, if the deeds recite the payment. There is a recital of such payment in this bond, and the fact of its having taken place is confirmed by the continued payments of the annuity, from the time when it was granted, in 1801, up to nearly the present time. I am therefore of opinion, that the verdict should be for the plaintiff.

Verdict for the plaintiff.

In the case of *Poole v. Cabanes*, the grantee of an annuity having paid it without objection, during the lifetime of the person who negotiated it for the grantee, the Court would not set the annuity

deeds aside, on a representation of facts that could only be answered by such deceased agent. In *Ex parte Maxwell*, the Court would not allow an annuity to be impeached (on the ground of a sup-

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HASLAM,
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DIGGLES.

Taddy, Serjt. and *Platt*, for the plaintiff.

Paughan, Serjt. for the defendant.

[Attornies—*Drew & Son* and *Rogers & Son*.]

posed defect of consideration) ten years after it had been granted, and six years after the death of the grantee; and Lord KENYON observed, that it was a circumstance worthy of notice, that the

period fixed by the statute limitations for claims affecting personal property, had run without any attempt to impeach the transaction.

July 13th.

SOAMES, Assignee of *BAKER*, v. *WATTS*.

In *trover* by the assignees of a bankrupt, to recover property in his order and disposition at the time of the act of bankruptcy, no demand and refusal are necessary.

An act of bankruptcy is committed by lying in prison for two months, though the party have the benefit of day rules during that period.

TROVER brought by the assignee of a bankrupt, named Baker, to recover certain property from the defendant (who claimed it under an execution put in before an act of bankruptcy), on the authority of the statute, 21 James I, c. 19, s. 11; the assignee contending that the property in question was property of which the bankrupt was the visible owner at the time of the act of bankruptcy.

The act of bankruptcy consisted of a lying in prison for two months; but it appeared, that once, during that period, the bankrupt was seen at his own shop.

Pell, Serjt. for the defendant, went first for a nonsuit, contending that *trover* could not be maintained, without a demand and refusal of the property. He cited *Nixon v. Jenkins*, 2 H. B. 135 (a), observing, that there was

(a) In *Nixon v. Jenkins*, the Court held, that a demand and refusal were necessary to support

trover by assignees, for goods taken by the bankrupt collusively, and in contemplation of his bankruptcy.

distinction between that case and the present, as the **transfer** in both cases was lawful at the time; and the very **reason** why a demand is necessary, is, because it is notice **that** keeping the goods is unlawful.

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 SOAMES,
 Assignee of
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Wilde, Serjt., contra. The statute of 21 James 1st. provides, that goods found in the possession of the bankrupt, as the visible owner, at the time of the act of bankruptcy, shall become the property of the assignees, and be distributed for the benefit of the creditors. The case cited is the case of a contract, which the assignees might either affirm or disaffirm; but here there is nothing to defeat.

F. Pollock, on the same side. The question here is, whether there be any evidence of conversion. I contend, that there is. At this moment persons are carrying on the business, and in possession of the goods.

BEST, C. J.—It does not appear that they are the same goods, transferred to other persons.

Wilde, Serjt., then shewed, by the evidence of one of the purchasers, that the goods were the same goods.

BEST, C. J.—I am of opinion, that, in this case, no demand and refusal will be necessary. The case cited stands on its own peculiar circumstances. The principle of that case is, that there was a contract, which might be affirmed or disaffirmed. But, I will give you liberty to move on the subject.

Pell, Serjt., then contended, that the act of bankruptcy was not proved, inasmuch as it appeared, that the bankrupt was not within the walls of the prison during the whole of the time, as required by the statute, 21 James I. c. 19, s. 2.

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 SOAMES,
 Assignee of
 BAKER,
 v.
 WATTS.

BEST, C. J., held, that the act of bankruptcy was complete, notwithstanding the party was seen once at his shop during the two months, observing, that the purpose of the act was, that it is evidence of insolvency, if he lies two months in prison without being able to get out, and, that when he is not actually within the walls of prison, he is either attended by an officer, or on bail for the day, and bound to return in the evening (D.).

Wilde, Serjt., mentioned, that ABBOTT, C. J. had decided in a similar manner in the King's Bench, case of *Sanderson v. Gray*.

Verdict for the plaintiff—Damages, 4

Wilde, Serjt., F. Pollock, and Wightman, 4
 plaintiff.

Pell and Bosanquet, Serjts., and Comyn, for the
 defendant.

[Attornies—Mayhew and Wheatstone.]

(b) In the case of *Stevens v. Jackson & Another*, 4 Campbell, 164, where a Sheriff's officer, on the 27th of August, 1814, arrested a man who was lying sick in bed, and suffered him to remain at his own house, in the custody of a follower, not named in the warrant, till he was sufficiently recovered, and then removed him to prison, where he remained till the

28th of October; GIBB held, that it was a sufficient arrest, to constitute an act of bankruptcy. The months and the day of 1 is to be considered as one in the number; unless the party is subsequently bailed; and time is to be reckoned from his return to custody.

1824.

STAFFORD and Another, Assignees of CLARK, Jun. a Bankrupt, v. CLARK, Sen. July 14th.

THIS was an action of *assumpsit*. The declaration consisted of seven counts. The 1st and 2nd were for goods sold; the 3rd, for money lent; the 4th, for money paid; the 5th, for money had and received to the bankrupt's use; the 6th, on an account stated with the bankrupt; and the 7th, on an account stated with the assignees.

A sum of 5*l.* had been paid into Court on the 1st, 2nd, and 5th counts.

The plaintiffs' demand was for the amount of two bills of exchange, which the defendant got into his possession after the commission of an act of bankruptcy by the bankrupt, his son, as well as for the sum of 30*s.*, which he received from his son, also after the act of bankruptcy. The case was made out by proof of an admission made by the defendant, to a person who called upon him on behalf of the assignees, that he had received the bills and the 30*s.* from the bankrupt, after act of bankruptcy.

Vaughan, Serjt., for the defendant, contended, that the 5*l.* paid into Court, applied to the demand of 30*s.* With respect to the bills of exchange, he set up as a defence, that they had been the subject of an action of trover between the same parties (a), in which action, there was a verdict and judgment for the plaintiffs; and that, therefore, they could not be made the subject of another action; and he offered in evidence the record in the former action of trover.

If assignees of a bankrupt have brought an action, and have attempted to prove one item of their demand, and fail, because they could not prove an act of bankruptcy sufficiently early, they cannot bring another action for that claim which they could not before succeed in. And the record in the former action is evidence in the second action, without being pleaded, though not conclusive as an estoppel.

An admission by a defendant that he has received 30*s.* from a bankrupt, after act of bankruptcy, will not support the count on an account stated with the assignees.

(a) See, *ante*, p. 24.

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Assignees of
CLARK, Jun.
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BEST, C. J., inquired, whether this should not
been pleaded?

Vaughan, Serjt., replied, that it was not neces-
assumpsit, but it might be given in evidence und
general issue. He cited the case of *Burrows v. J*
2 Strange, 733, from which it appeared, that the opi
contended for, was sanctioned by the authority o
Chief Justice HOLT (b). He also referred to *Kitt*
Campbell, 2 Sir W. Blackston, 831 (c); and *Bird v*
dall, 3 Burr. 1345 (d).

(b) This opinion is to be found
in the observations of Lord Chan-
cellor KING, in giving judgment
in *Burrows v. Jemino*.—He there
said, “That he remembered a
“ case which came before him in
“ the Lord Mayor’s Court, when
“ he was Recorder of London,
“ where a mariner sued in the Ad-
“ miralty Court for his wages;
“ and there being a sentence
“ against him there, he afterwards
“ brought his action in the
“ Mayor’s Court for the same
“ wages; and his Lordship (as
“ Recorder), being doubtful whe-
“ ther he should allow the de-
“ fendant to give the sentence in
“ the Admiralty Court in evi-
“ dence upon *non assumpsit*, ask-
“ ed the opinion of Chief Justice
“ HOLT; who said, that whatever
“ defeated the promise, might be
“ given in evidence on *non as-*
“ *sumpsit*; and that the sentence
“ in the Admiralty Court would
“ be good evidence.”

(c) Reported also in 3 Wils.
Rep. 304.

(d) In that case (p. 135
MANSFIELD says, that th
essential difference betw
upon torts, and actions
case, which is, “that t
“ actions *stricti juris*; an
“ fore, a former recovery
“ or satisfaction, cannot
“ in evidence, but must
“ ed: but an action upon
“ is founded upon the me
“ and conscience of the
“ case, and is in the nat
“ bill in Equity, and in ef
“ and therefore such a fi
“ covery, release, or sat
“ need not be pleaded,
“ be given in evidenc
“ whatever will, in eq
“ conscience, according t
“ cumstances of the case
“ plaintiff’s recovery, m
“ action be given in evi
“ the defendant, because
“ tiff must recover upon
“ tice and conscience of
“ and upon that only.”
the next note).

Comyn, who was with Pell, Serjt., for the plaintiffs, cited the case of *Vooght v. Winch*, 2 B. & A. 662 (e), in which Lord Chief Justice ABBOTT had distinctly stated his opinion, that a verdict and judgment are not conclusive evidence, unless pleaded.

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BEST, C. J., allowed this evidence to be received; but, on account of the opinion expressed in *Vooght v. Winch*, gave the plaintiffs' counsel leave to move the Court above on the subject.

It was admitted, that the bills were included in the declaration in the former action, and that witnesses were examined on the subject of them; but it appeared that they had not been recovered then, on account of an omission to prove an act of bankruptcy early enough to overreach the delivery of them by the bankrupt to the defendant; although there were materials for such proof in the briefs, which, in the hurry of the moment, were overlooked by the counsel.

[F. In this case, ABBOTT, C. J., says: "I am aware that in *Burd v. Randall*, Lord MANSFIELD is reported to have said, that a former recovery need not be pleaded, but will be a bar when given in evidence. I cannot, however, recede from that: for the very first thing I learnt in the study of the law was, that a judgment recovered, must be pleaded: that has so strongly impressed itself on my mind as a general principle, that nothing I have heard in argument this day, has shaken it." And Mr. Lushington's opinion appears to be, that if a former verdict and judgment are given in evidence under

the general issue, they are not conclusive, as they would be if pleaded, but go to the jury like other evidence: and Mr. Justice BAYLEY lays down, that a defendant may plead a former verdict for the same cause of action by way of mitigation: but if he pleads the general issue, the jury have to say whether he is guilty or not; and the defendant may prove that the act was not done by him, and that another jury were of opinion that he was not guilty: and for that purpose may give in evidence the judgment in the former cause for the consideration of the jury. The question, still, being, whether the defendant is guilty or not."

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BEST, C. J.—I am of opinion that the plaintiff is entitled to 80s. only. This is an action to recover three sums. With respect to the bills, it is in evidence, that an action of trover was brought for them, and evidence given; and the reason of the assignees' failing to recover was, that the counsel, though they had the means, did not prove an act of bankruptcy sufficiently early. I think the plaintiff cannot recover in a second action what he might have recovered in the first. He had the evidence; and it would be vexing the defendant to suffer a second action to be brought. Whether it happened through the negligence of the attorney or counsel, or of any one else, is immaterial. From the cases mentioned, it appears, that record need not be pleaded in *assumpsit*; and it has been settled of late, that whatever goes to shew that the plaintiff has no right of action in *assumpsit*, is evidence under the general issue.

The verdict was about to be taken as money had and received, on the 5th count, when *Vaughan*, Serjt., for the defendant, objected, that there was no count for money had and received, *to the use of the assignees*, which, from the evidence, this appeared to be.

Pell, Serjt., for the plaintiff, replied, that he went on an account stated, as there was an admission to the agent of the assignees of the fact of the money having been received.

BEST, C. J., thought the evidence did not make out the account stated, and directed a verdict for 80s. on the 5th count, with liberty to *Pell*, Serjt., to move to increase it by adding the amount of the bills; and to *Vaughan*, Serjt., to move to enter a Nonsuit.

Verdict for the plaintiffs.

Pell, Serjt. and *Comyn*, for the plaintiffs.

Vaughan and *Cross*, Serjts., for the defendant.

[Attornies—*Jones & Bland* and *Sarel*.]

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Michaelmas Term.

BEFORE BEST, C. J., PARK, BURROUGH & GAZELEE, JS.
In Bank.

Pell and *Vaughan*, Serjts., moved, respectively, in pursuance of the leave given at the trial; the one to increase the verdict, by adding the amount of the bills, or to have a new trial, if the Court should be of opinion that the record was not receivable in evidence, under the general issue. And the other, to enter a nonsuit, if the Court should be of opinion that the 5*l.* paid in on the 1st, 2nd and 5th counts, was to be applied to the discharge of the 80*s.* found to be due on the latter of those counts only.—They obtained rules *nisi*, which came on to be argued together in the course of the term.

Vaughan, Serjt., was heard first, against the increase of the amount of the verdict; and in favor of the nonsuit. He contended, with respect to the bills, that it would lead to infinite mischief and circuity of action, if a plaintiff, having many causes of action, were to unite them in one suit, and offer evidence on all, and failing in some, be still allowed to recover in other suits, for those on which he had failed. “*Nemo debet bis vexari*,” he observed, was the doctrine of the Judges in *Kitchin v. Campbell*.

GAZELEE, J.—My difficulty is, that these bills were not left to the consideration of the jury, but were, it seems, expressly excluded.

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BEST, C. J.—The constant course in such cases, is, to apply to the Court, and get rid of your verdict yourself, and the Court will grant the application on terms.

Vaughan, Serjt. The same cause of action, is that which the same evidence will support; and when, in a personal action, the same cause of action has been presented to the consideration of the Court, you may use the former verdict as a bar. I admit, that if it is not pleaded it is not an estoppel, but a question for the jury. This appears from the *Duchess of Kingston's* case, and the case of *Outram v. Morewood*, 3 East, 346. If no evidence had been offered, the case might have been different, but here there was an attempt to recover, and it is laid down that, in *assumpsit*, whatever goes to discharge the cause of action, may be given in evidence under the general issue; as, for example, accord and satisfaction, a release, &c., *Brown v. Cornish*, 1 Lord Raymond, 217; Co. Lit. 303, a; *Ferrer's* case, 6 Rep. 7.

Cross, Serjt, followed on the same side. He cited *Moses v. Macferlan*, 2 Burr. 1006. He also contended that *Vooght v. Winch* was strained further than its true meaning warranted. He farther argued, that the record in this case was admissible, by analogy, to that class of cases in which it had been holden, that a foreign judgment may be given in evidence in an action against an underwriter, without its being pleaded. *Geyer v. Agnew*, 7 Ter. Rep. 681; *Bolton v. Gladstone*, 5 East, 155.

Pell, Serjt., against the nonsuit, argued, 1st, that the verdict for the 30s. should have been taken on the 7th count, which was an account stated with the assignee. The merest admission on an account stated is enough; an admission of one item only.

BEST, C. J.—The defendant told the witness he had re-

ceived the money. Is that an account stated with the assignees?

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Pell, Serjt. In law it is; because the witness applies on behalf of the assignees: and he cited *Knowles v. Mitchell*, 13 East, 249; and *Highmore v. Primrose*, 5 M. & S. 65, to shew the nature of the evidence which would support an account stated.

PARK, J.—My difficulty is this: Here is a rule of Court, by which the defendant says, I pay you 5*l.* on certain counts; and shall you, by giving the rule in evidence, draw the defendant into an admission, on a count, which he has negatived by the payment of the money?

BEST, C. J.—If I say “I owe you 30*s.*,” that is an account stated; but not if I say, “I have received” that sum.

Pell, Serjt. Here is evidence of an existing debt, and that is evidence on an account stated. The saying, or what amounts in substance to saying, “I owe you,” or “I have for you,” is sufficient.

On *BEST, C. J.* stating decisively, that the verdict was taken on the 5th count, that being the only count for money had and received, the Court were of opinion that it was conclusive, and stopped the further discussion of the subject.

With respect to the 2nd point, *Pell, Serjt.*, contended, that a record should be pleaded, to give the other party a replication, and not put in on the general issue, so as to call upon him to meet it in the hurry of *Nisi Prius*; and he cited *Seddon v. Tutop*, 6 Ter. Rep. 607. He contended, further, that the opinion of *ABBOTT, C. J.*, in *Vooght v. Winch*, must be taken in a general and unrestricted sense,

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and that foreign sentences ranged themselves under a different principle, and therefore were not in point.

PARK, J.—If you put a record upon the table and say, “Here is a record, this is conclusive,” that alone will not do; but you must show the relevancy of it, unless that be admitted. This will, I believe, go to reconcile most of the cases.

Pell, Serjt.—ABBOTT, C. J., in *Vooght v. Winch*, mentions *Bird v. Randall*, and yet his judgment is pointedly against it.

PARK, J.—In this case, I am of opinion, that judgment of nonsuit must be entered. We think ourselves bound by the note of the Chief Justice, that the verdict was taken on the 5th count, for money had and received; and not on the 7th count, on an account stated with the assignees. But even if we were not, it would make no difference, for I think the account stated is not supported by the evidence. It is one thing to say “I owe,” and another to say “I have received.” I think also, that when a defendant has paid in money on specific counts, it is not competent to the party who has taken it out, afterwards to say, that it applied to other counts than those on which he received it. As to the other question, I think, on the ground taken at the trial, that a nonsuit ought to be entered. I have no doubt that a record is admissible in evidence in some cases, without being pleaded; for the authorities are, that if a party puts it in as an absolute bar, then he must plead it, but if not, he may give it in evidence. Chief Justice DE GREY and Lord MANSFIELD lay down this distinction: If in this way a record is put in, it is not to introduce the trial *per recordum*, to try its validity, as when it is pleaded, but only as a circumstance to shew that there has been a former decision on the subject.

BURROUGH, J.—The record was admissible in evidence; because, without it, the defendant could not have gone into what took place at the former trial. I give my judgment for the defendant, because I think a man cannot be allowed to split his cause of action into two parts. The plaintiffs, at the first trial, did not produce the requisite evidence; that was their own fault, and they must not be allowed to harass the defendant by a second trial.

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GARRETT, J.—There are different authorities as to what would be the effect of the record if given in evidence. I have not been able to find any one authority to say, it may not be given in evidence on the general issue. On the contrary, as early as the time of Salkeld, a distinction appears to have been taken. From the subsequent part of the case of *Voight v. Winch*, it appears that the opinion of ABBOTT, C. J., has not so broad a signification as has been attempted to be put upon it. All that is meant is, that a party must plead a record, if he means to make it conclusive. What the effect would be, of paying money into Court, I do not say, the verdict having been taken on the 5th count.

BEST, C. J.—I entirely agree with my learned Brothers. There were three points made at *Nisi Prius*. 1st, Whether, the bills in question having been made the subject of a former action, and evidence having been given respecting them, the plaintiff could recover them in the present suit. I had no doubt, at *Nisi Prius*, that he could not. I am still of the same opinion, and am borne out in it by authorities. The cases of *Hall v. Stone*, 1 Strange, 615, and *Markham v. Middleton*, 2 Strange, 1259, shew, that by an application to the Court, a remedy might be had on payment of costs. There is a distinction—The law is, that if a party offers no evidence on a particular part of his claim, then a new action may be brought for such part; but if he does offer evidence, and fails, he is

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prevented from bringing a fresh action, because it would be harassing the defendant. With respect to the giving in evidence the record on the general issue, I at first thought that it could not be done; but, on my Brother *Vaughan* mentioning the cases of *Bird v. Randall*, and *Burrows v. Jemino*, my opinion was altered. I am now clear, that it was competent to give it in evidence without its being pleaded. As to the last point, I am of opinion that the verdict was rightly taken on the 5th count. There was nothing in the evidence to support an account stated. The cases cited on the subject prove, that an admission of a balance is evidence on an account stated; but in this case there was nothing more than the admission of an item.

Judgment of nonsuit.

July 16th.

HARRISON v. HARRISON.

In assessing damages on a writ of enquiry, on a bond to replace stock, the fair rule is to take the price of the stock on the day of the trial, or the day previous.

THIS was a writ of enquiry, executed before the Lord Chief Justice, to assess damages on a bond to replace stock.

The question was, as to the day on which the price of the stock should be taken, in order to calculate the amount of damages.

Wilde, Serjt. for the plaintiff, contended, that the price should be taken on the day before the execution of the writ of enquiry.—He argued, that the object of the bond's being given was, to ensure to the plaintiff *the same quantity of stock*; and, in order to do this, it was necessary, the defendant not having purchased it at the day mentioned in the bond, that the plaintiff should recover as

much money from him as would secure the purchase of the stock at the time of such recovery. He contended, that there was a distinction between the cases of stock and goods; and he cited *Shepherd v. Johnson*, 2 East, 211 (a); *M'Arthur v. Lord Seaforth*, 2 Taunt. 257.

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Lawes, Serjt. for the defendant.—This is an action on a contract to be performed on a particular day. It becomes a debt from the time of its ceasing to be performed. A claim is made for collateral damages: to this there are two answers. The 1st is, that the parties have not stipulated for it in the contract. The 2nd is, that all the damage stated on the record is the not transferring the stock on the particular day. There is no allegation of any loss from a subsequent rise of the stocks. It is a naked breach. *Non constat*, that if the stock had been transferred on the particular day, that the plaintiff would have continued it there; and he cited *Isherwood v. Seddon*, mentioned in 2 East, 212 (b).

BEST, C. J.—I think the fair rule is, to take the damages at the price of yesterday or to-day. When you had the money, you promised to restore the stock. Justice is not done, if you do not place the plaintiff in the same situation in which he would have been if the stock had been

(a) In this case, the stock had risen, at the time of the trial, above the price which it had borne on the day on which it was agreed to have been replaced; and the Court held, that the plaintiff was entitled to the price it bore at the time of the trial: but in *M'Arthur v. Lord Seaforth*, the Court would not allow the plaintiff to recover an advantage that he might have made of his stock, if he had had it between the day on which it ought

to have been replaced and the trial; as from the evidence it appeared, the plaintiff would not have made the advantage if he had had the stock.

(b) This case is mentioned in 2 East, as having been decided by Lord KENYON; but the doctrine of it does not appear to have been adopted by the Court in the case of *Shepherd v. Johnson*, in which it was cited.

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replaced at the stipulated time. We cannot act on the possibility of the plaintiff's not keeping it there. All we can say is,—you have effectually prevented him from doing so.

Verdict for plaintiff, with damages according to the price of the day preceding the execution of the writ of enquiry.

Wilde, Serjt, and Wightman, for the plaintiff.

Lawes, Serjt. for the defendant.

[Attornies—*Makinson and Yatman.*]

July 17th.

BREMNER v. WILLIAMS.

Every stage-coach proprietor impliedly undertakes that his coach shall be sufficiently secure to perform the journey it undertakes; and he ought to examine its sufficiency previous to each journey; and if he does not, and by the insecurity of the coach a passenger is injured, an action is maintainable against the coach proprietor for negligence, tho'

ASSUMPSIT against the defendant, who was proprietor of a Kentish-Town stage, to recover a compensation for an injury sustained by the plaintiff, in consequence of the insufficient state of the defendant's coach.

It was proved, on the part of the plaintiff, that he, and his two sons, got into the dickey of the coach in question, for the purpose of being taken to Kentish-Town. When the coach was in Gray's Inn Lane, the plaintiff felt a moving of the dickey, and called to the driver, and told him of it, and asked him if it was loose?—The driver replied, that the motion was produced by the bending of the springs merely, and then drove on; and, soon after, the dickey came off, and the plaintiff fell.

On the part of the defendant, the driver was called; who stated, that the coach had come from the coach-maker's only three or four days before.

maker's, where it had been under repair, only three or four days before the accident; that it was not a very old coach; and that he washed it, and his master examined it, on the very morning on which the accident happened. On his cross-examination, he admitted, that, at the time the plaintiff went, the coach was on its second journey, and that no examination had taken place immediately previous to that journey.

The coach-maker also proved that the coach was sent to him, with directions to do the needful; which he did: and when he sent it out, he had every reason to believe it safe. He stated, also, that the condition of that part which broke, and to which the diekey was attached, could not be discovered by external examination only. But, on his cross-examination, he admitted, that its breaking might have been produced by previous overloadings.

Faughan, Serjt. for the defendant. This action is founded in negligence; and it should be shown that the defendant, or his servants, were undoubtedly to blame. The proprietor is only responsible if there is not ordinary and reasonable care. If the coach came out of the coach-maker's defective, and the defect could not be discovered by external inspection, the defendant certainly cannot be liable.

Pell, Serjt. for the plaintiff, in reply. The driver should have stopped and investigated the plaintiff's complaint when it was made to him in Gray's Inn Lane. The action is not, as has been said, founded in negligence. The record is, that the defendant undertook securely to carry the plaintiff to the end of his journey. It was a part of the substance of the coach which gave way. The proprietor is bound to provide for every journey a coach fit and competent for the performance of that journey.

BEST, C. J.—The declaration states, that the defendant

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undertook to carry the plaintiff safely. There is no express undertaking that the coach shall be sound, nor is it necessary; for I consider that every coach-proprietor warrants to the public that his stage-coach is equal to the journey it undertakes. The counts go on to charge negligence, and the case may be decided upon that ground also. The plaintiff, it seems, complained in Gray's Inn Lane; and if the driver had then got down, most likely the accident would not have happened. It is for the jury to say, whether, when a man's attention is called to a particular motion of the dickey of his coach, and he does not get down to examine the cause, is not this a negligence. The driver said, it was the playing of the springs; but it could not be so, for the plaintiff would have found that before. I am of opinion, that it is the duty of a proprietor of a stage coach to examine it previous to the commencement of every journey. For, when ten or fourteen people are placed on the outside, as is the case with many of these stages, a master is guilty of gross negligence if no inspection of the coach takes place immediately previous to each journey.

Verdict for the plaintiff—Damages 51*l*.

Pell and Wilde, Serjts. and Comyn, for the plaintiff.

Vaughan, Serjt. and Curwood, for the defendant.

[Attornies—*J & T. Davies and Eicke.*]

1834.

BALL v. TAYLOR.

July 17th.

ACTION on a Bond. Plea—*Non est factum*.

The witness who was called to prove the execution of the bond said, on his cross-examination, that he did not recollect whether there was any wafer or seal to the instrument at the time the defendant signed it; and that the defendant read it over, but he could not say whether he delivered it or not.

The bond, on inspection by the Court, appeared to have a seal, and the attestation was in the usual form, "signed, sealed, and delivered;" but the witness said he did not read over the attestation before he signed it.

Vaughan, Serjt., under these circumstances, submitted that the execution was not proved.

Best, C. J.—I shall tell the jury that there is evidence of all that is right having been done. If a man puts down a bond on a table for another to take it up, that is a delivery. If, on inspection, no seal had been found affixed, then I should have held that it would not do. The words of the bond are "sealed with our seals," and on inspection we find seals. If sealing and delivery are not presumed, and it is made to rest upon the fallible memory of a witness at a distance of time, as to whether all the requisites were performed at the time, great danger would result to bonds, and, perhaps, to other instruments on which the welfare of families depends.

A witness to prove the execution of a bond, did not recollect whether, at the time it was executed, it had any seal; and he swore that he did not read the attestation at the time he witnessed the execution: but there being a seal at the time of the trial, and the bond itself saying, "sealed with our seals:" it was held to be sufficient proof; but this evidence would not have been sufficient, if there had been no seal on the bond at the time of the trial.

Onslow, Serjt., as *Amicus Curiae*, mentioned, that he was once engaged in a case, in which the present Lord Chancellor held, that similar evidence to that now produced was sufficient to raise the presumption that every

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BALL
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thing necessary was done ; and that, to rebut such presumption, the contrary must be distinctly proved.

The Lord Chief Justice directed a verdict for the plaintiff.

Wilde, Serjt. and *F. Pollock*, for the plaintiff.

Vaughan, Serjt. for the defendant.

[Attornies, *Knight & Fyson* and *Mann*.]

CASES

AT

NISI PRIUS,

AT THE

Sittings in Michaelmas Term.

COURT OF KING'S BENCH,

sittings at Westminster, Michaelmas Term, 1824,

BEFORE LORD CHIEF JUSTICE ABBOTT.

—
GRIFFITH v. HODGES.

1824.
Nov. 17th.

SUMPSIT for use and occupation. **Pleas**—General
e, and a tender of seven guineas. **Replication**—A
requent demand of the seven guineas, and a refusal
he defendant to pay that sum.

appeared, that, at Midsummer, 1823, the defendant
the first floor and kitchen in the plaintiff's house, at
y guineas a-year; but that, after staying a few days,

the landlord of lodgings enter into, or use, the lodgings, while his tenant is in possession
m, it deprives the landlord of his right to rent; but if the tenant has, during the tenancy,
doned the possession, and the landlord lights fires in the rooms, and even makes some
f such fires, he will not by this lose his right to rent.

If a person ten
der money, but
will not pay it
unless the per-
son to whom it
is tendered will
give him a re-
ceipt in full of
all demands,
such a tender is
bad.

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the defendant went away, and left the apartments unoccupied; and that in Feb. 1824, a quarter's rent was demanded of him, when he offered seven guineas, which the plaintiff then declined accepting: but on a subsequent day, the plaintiff's attorney applied for the seven guineas, which the defendant refused to pay without a receipt in full of all demands, which the plaintiff's attorney would not give; but he offered a receipt for the money, which he had ready written, but this the defendant would not accept.

The defence was, that about a fortnight after the defendant left the apartments, and long before the quarter had expired, or any rent had become due, the plaintiff had resumed the possession of the apartments, and so waved his claim to rent. But the only evidence that the plaintiff had resumed the possession was, that a fortnight after the defendant quitted the apartments, the plaintiff had a fire lighted in the kitchen, at which he caused a hare to be roasted.

ABBOTT, C. J.—No man can insist on a receipt in full of all demands; and if a man makes a tender of money, insisting at the same time on a receipt in full of all demands, I have no doubt that such a tender is bad: therefore on that part of the case the plaintiff is entitled to a verdict. On the other point: If a landlord, while his tenant is in the possession and use of apartments, enters and uses such premises, or any part of them, that will deprive him of his claim to rent. But here the tenant had left the apartments vacant; and as it was proper that fires should be lighted in them, I don't think that the plaintiff by lighting such a fire, or even making some use of it when he had lighted it, is a sufficient taking possession of the premises to deprive him of his right to rent.

Verdict for the plaintiff.

Scarlett and Andrews, for the plaintiff.

Marryatt and Holt, for the defendant.

[Attornies—*Allen & Co.* and *Loxley*.]

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ARGUMENT BEFORE THE TWELVE JUDGES.

PRESENT ABBOTT, C. J., BEST, C. J., ALEXANDER, C. B.,
GRAHAM, B., BAYLEY, J., PARK, J., HOLROYD, J.,
BURROUGH, J., GARROW, B., HULLOCK, B., LITTLE-
DALE, J., AND GASELEE, J.

REX v. HENRY FAUNTLEROY.

Nov. 23rd.

THE prisoner, who was a partner in the banking-house of Marsh and Co., in Berners-street, had been charged, with forging, in the city of London, a letter of attorney to transfer stock; and was tried before PARK, J. and GARROW, B. at the last October Sessions at the Old Bailey.

A power of attorney under seal to transfer stock in the public funds is a deed; and the uttering of such a power of attorney, knowing it to be forged, is an uttering of a forged deed within the statute 2 Geo. 2, c. 25, § 1, and is a capital offence under that statute.

The indictment on which he was tried contained eleven counts: the first count charged him with *forging "a certain deed,"* and in it was set out a forged power of attorney, purporting to be executed by Frances Young, and empowering the prisoner to sell out her stock in the 3 per cent. Consols. The 2nd count charged him with *uttering "a certain false, forged, and counterfeited deed, knowing it to be forged;"* and set out the same forged power of attorney. The 3d count was for *"disposing of and putting away a certain false, forged, and counterfeited deed;"* and set out the same forged power of attorney. In these counts the offence was charged to have been committed with intent to defraud the Governor and Company of the Bank of England. The 4th count was similar to the 1st; the 5th count similar to the 2nd; and the 6th similar to the 3rd, except that they laid the offence, with intent

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 Rex
 v.
 FAUNTLEROY.

to defraud Frances Young. The 7th was also similar to the 1st; the 8th similar to the 2nd; and the 9th similar to the 3rd, except that in these the offence was laid with intent to defraud Charles Flower (the person to whom the prisoner had sold the stock under the power of attorney). The 10th count was for forging a letter of attorney to transfer the share of Frances Young in the capital stock of certain annuities, called *Consolidated three pounds per cent. Annuities*, established by an act of 25 Geo. 2 (the title of which was set out), and by divers subsequent acts of Parliament; and stated, that the proprietors of such annuities had transferable shares in such capital stock; in this count the power of attorney was set out. The 11th count was similar to the 10th, except that instead of saying that the stock was established by an act of 25 Geo. 2, and by divers other acts of Parliament, it set forth the titles of all acts relating in any way to the stock, (in number 49).

The power of attorney, set out in every count of the indictment, was in the following words:—

“Know all men by these presents, that I Frances Young, of Chichester, spinster, do make, constitute, and appoint William Marsh, Sir James Sibbald, Baronet, Josias Henry Stracey, Henry Fauntleroy, and George Edward Graham, all of Berners-street, bankers, my true and lawful attornies, jointly, and each of them separately, for me, and in my name, and on my behalf, to accept all such transfers as are, or may hereafter be made unto me of any interest or share in the capital or joint stock of 8 per cent. Annuities, created by an act of Parliament of the twenty-fifth year of the reign of his Majesty King George II. entitled, an act for converting the several annuities therein mentioned, into several joint stocks of annuities, transferable at the Bank of England, to be charged on the Sinking Fund, &c. and by several subsequent acts. Also, to receive and give receipts for all dividends due and payable for the same for the time being.

Likewise, to sell, assign, and transfer, all or any part of five thousand pounds, being part of my said stock or annuities; to receive the consideration-money, and give a receipt or receipts for the same; and to do all lawful acts requisite for effecting the premises; hereby ratifying and confirming all that my said attornies, or either of them, shall do therein, by virtue hereof. And, in case of my death, this letter of attorney, as to all matters and things which after my decease shall be done by my said attornies, or either of them, by virtue of, or under colour or in pursuance thereof, shall, so far as the Governor and Company of the Bank of England are interested or concerned, be as binding on my executors and administrators, as the same would have been upon me if living, unless notice in writing of my death shall have been previously given to the said Governor and Company by my executors or administrators, or by some person or persons interested in the property to which this letter of attorney refers. And, unless such notice be given, I hereby promise and engage, and bind myself, my executors, or administrators, to and with the said Governor and Company of the Bank of England, that they, my said executors or administrators, shall and do allow, ratify, and confirm, as good, valid, and effectual, against them, and against my estate, whatsoever shall or may be done by my said attornies, or either of them, after my decease, in far as the said Governor and Company of the Bank of England shall or may be, in any way or manner, interested therein. In witness whereof I have hereunto set my hand and seal, the thirty-first day of May, in the year of our Lord one thousand eight hundred and fifteen,

Frances Young. [L. S.]

*Signed, sealed, and delivered
in the presence of*

John Watson,
James Tyson,

Clerks to Marsh, Sib-
bald, & Co. Bankers,
Berners-street.

The prisoner was found guilty on the 2nd, 5th, and 8th counts; that is, for uttering a forged deed with intent to

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defraud the Bank, Frances Young, and Charles Flower, respectively.

In arrest of judgment, *Alley, Brodrick*, and *C. Phillips* contended, that the Court could not give a judgment affecting the prisoner's life on this conviction; because the uttering of such a forged power of attorney, as was stated on the face of this record, was not a capital offence; a power of attorney to transfer stock not being a deed within the meaning of the statute 2 Geo. 2, c. 25, § 1. But, after they had been heard in favour of this objection, and *Bosanquet*, Serjt., and *Law, contra*, GARROW, B., and the *Recorder* were of opinion, that the objection was not good, and over-ruled it; and the prisoner was condemned to be hanged. But, subsequently, the prisoner petitioned the Crown, on the ground that the objection taken by his counsel, had been improperly over-ruled. The case, was argued before the Twelve Judges, by *Brodrick* for the prisoner, and *Bosanquet*, Serjt., for the Crown.

Brodrick. The question is, whether the uttering of this power of attorney is the uttering of a forged deed, within the meaning of the statute 2 Geo. 2, c. 25, § 1. It was most truly stated, on the motion in arrest of judgment at the Old Bailey, that, a few years since, a person named *Wait* was tried and convicted on counts similarly framed to those on which the present prisoner was convicted: his case too came under their Lordship's consideration (7 Moore, 473); but it was on a question raised as to the competency of a witness. And in that case the present question was not raised by the prisoner's counsel, as it would have weakened the arguments he used on the objection taken in that case. In the case of *Lyon*, 2 Russ. 1602, the principal point was, whether the forgery of a power of attorney to receive seamen's prize-money, which was not in the form prescribed by the stat. 45 Geo. 3, c. 72, § 92, was a capital offence. It is clear, that no express enactment makes uttering a forged power of attorney a

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specific offence; and the question will be, whether it falls within the 2 Geo. 2, as uttering a deed. My *first* proposition is, that this power of attorney is not, by correct legal description, a deed; though I admit there are words of covenant contained in it. And if I should fail in this, I shall shew, that it is not such a deed as was intended by the Legislature to be included in the 2 Geo. 2; and, if it was not so intended, it will not be so construed, though it may be within the words. As to the *first* point.—From the earliest times, deeds and powers of attorney have been considered as different. In Com. Dig. Title *Fait*, a deed is defined to be a contract, signed, sealed, and delivered; and it cites Co. L. 35 b.: and in that book, p. 171 b., it is described to be an instrument comprehending writing, sealing, delivery, and matter of contract. This definition or description, as to contracts, may be rather too narrow, as it may be extended to grants. However, Spelman, Ducange, Cowell, and Wood, Ins. all speak of a contract as essential to the definition of a deed. Now, a letter of attorney is a mere authority to act, and no interest passes; it is revocable by matter in *pais*, and does not require to be revoked by matter of equally high nature; indeed, in the case of *The King v. Wait*, (7 Moore, 478), Mr. Serjt. *Bosanquet* himself contended, that powers of attorney were revocable by matter in *pais*, and cited 2 Roll's Abr. 8, pl. 5 & 10; and the learned Serjt. said, that the party himself afterwards acting, was a sufficient revocation of the power of attorney; and that in practice they were never revoked by deed. Deeds were called by the ancient writers *facta* and *chartæ*; bond powers of attorney were called *literæ*. In Maddox's *Formulare Anglicanum*, p. 448, there is the oldest power of attorney known; it was to deliver seisin, and was under seal; it is called *litera*, and the *feoffment* is called *charta*. There is another in the same work (p. 449), of the date of 1235, and indeed many more.

GRAHAM, B.—Littleton lays down, that authority to deliver seisin must be *per fait*.

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Brodrick. In some books, powers of attorney may be loosely called *faits*, but never *facta* or *chartas*. In Flou, b. 1, c. 22, p. 32, *Crimen falsi* is laid down to be *chartis aut literis*, making a clear distinction between the *chartis* and the *litera*. Powers of attorney are not the only instruments sealed and delivered, which are not deeds; awards are often signed, sealed, and delivered; *Dodd v. Herbert*, Sty. 459.

BAYLEY, J.— But the authorities say, that they are only delivered as awards.

Brodrick. A case in the Year Book, 35 Hen. 6, c. 37, shows, that a letter of attorney was not considered as a deed. The covenant to indemnify the Bank against all acts of the attorney in pursuance of the power, after the death of the party, carries the case no further; for just such covenants are in the forms I have cited from Meddox's *Formulare*; and yet they are still termed *littere*, and not *facta*. The legal effect of the words used in an instrument is to be considered: now, though the words used, are words of contract, yet they do not amount to, nor can they operate in law as a covenant, inasmuch as they confer no right of action beyond that which is given by the preceding words in the instrument, of which they are, in substance, a repetition; a contract by A. never to sue B., is a release, and must be pleaded as such. If I have made out that a power of attorney is not a deed, this conviction cannot be supported; but if I have only succeeded in making it doubtful, great weight is thereby added to the *second* point, that the Legislature did not mean to include powers of attorney in the term deeds. The fact of there being some statutes relating to deeds, and others to powers of attorney, affords a strong argument, that the Legislature considered them as distinct objects of penal legislation. It is not the mere words, but the intent of Parliament that must be consi-

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dered (a). Penal statutes must be construed strictly; and I need not notice the doubt on the Statute of Edw. 6th, for stealing horses, whether a person could be convicted of stealing a single horse. And Lord KENYON lays down (4 Ter. Rep. 665), that a penal statute cannot be extended to cases not intended by the Legislature, though within the mischief intended to be remedied. And another strong authority, and more express, is in 2 Inst. 386. This was cited by my Lord Chief Justice in *Doe, et al. Nethercote v. Bartle*, 5 B. & A. 501; and it is there laid down, "That a case out of the mischief intended to be remedied by a statute, shall be construed to be out of the purview, though it be within the words." It will, therefore, be my object to shew, that the Legislature, under the term "deed," did not intend to include powers of attorney. The way to expound an act of Parliament, is by a reference to the preamble, and the reason of making the act, Com. Dig. (tit. Parliament), and Plowd. 368. The stat. 8 Geo. 1, c. 22, was the first act, which made it a capital offence to forge a power of attorney to transfer stock. That statute not only makes it capital to forge, or procure such power to be forged, but also to knowingly demand, or endeavour to have such stock transferred, or to falsely personate, &c. This statute, on which the last two counts are framed, evidently meant to provide for offences of this kind. The stat. 2 Geo. 2, c. 25, on which the conviction took place, recites, that it was necessary to extend a more exemplary punishment to forgeries; and it makes forging a deed a capital felony: the letters of attorney were included in the former statute. It will not be denied, that all bank powers were, before the 8 Geo. 1, in the same form as now: and it is clear, collecting the intention of the Legislature from their words, that they did not, in the statute 2 Geo. 2, mean to include powers of attorney; but clearly meant other deeds, if these be deeds at all; for, before that act, it was not a capital offence to forge a

(a) See the judgment of BAYCOMBE, 2 B. & A. 50.
 LEE, J., in *Omond v. Middle-*

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deed, though it was so to forge a letter of attorney to transfer stock. In the stat. 31 Geo. 2, c. 22, § 77, the provisions of 8 Geo. 1, as to powers of attorney, are re-enacted, only extending it to corporations who might be injured; and, in § 78 of the same act, the 2 Geo. 2, as to deeds, is re-enacted, with a little extension in regard to corporations; and this proves to demonstration, that the Legislature considered them to be different instruments. The 37 Geo. 3, c. 122, makes it an offence to forge the witnesses' names to a power of attorney, but does not extend to deeds; and a number of other acts of Parliament make it penal to utter forged powers of attorney to receive seamen's wages (9 Geo. 3, c. 80, § 6), of out-pensioners from Greenwich Hospital, &c.; but none of these mention deeds: and if uttering them was capital under the 2 Geo. 2, as for uttering forged deeds, these enactments would all be unnecessary. I must therefore contend, that if a power of attorney is a deed, it is not so within the meaning of the stat. 2 Geo. 2.; and that, therefore, the uttering it, knowing it to be forged, is not a capital offence.

Bosanquet, Serjt., for the Crown. On the question, whether a power of attorney, is a deed, many definitions from learned authors have been quoted, particularly Lord Coke. This shews how dangerous it is to take definitions even from high authorities; for though it is contended that nothing is a deed which has not a contract in it, those very learned authors, and many others, lay down that a letter of attorney to deliver seisin, and to receive seisin, must be by deed; releases, confirmations, and disclaimers, are all by deed, and yet they are neither of them matters of contract. The argument on the other side is, that there are two sorts of sealed instruments, one sort called *chartæ*, the other *literæ*. In Co. Lit. 52 a., it is laid down, that the authority to deliver seisin must be *by deed*; a letter of attorney to execute a deed must also be so; as must a letter of attorney to convey any matter lying in grant: and Lord Coke continues—"for *literæ*

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does sometimes signify a deed, as *literæ acquietanciæ* ;” and he cites Britton 101 b. : and I therefore contend, that a written instrument, signed, sealed, and delivered, is a deed. In *Goddard’s* case, 2 Rep. 5, it is laid down, that a deed is a writing on parchment, signed, sealed, and delivered ; and 2 Roll. Abr. 21, goes to the same point. In another case, in *Dyer*, the question was, whether forging a customary, sealed by the copyholders of a manor, was within the statute of Elizabeth. The Court thought that it was ; but the word deed is not mentioned. It is said, that an award signed and sealed is not a deed : and in the case of *Brown v. Pawser*, 4 East, 584, the question was, whether an award under a seal must have a deed stamp ; and Lord ELLENBOROUGH said, that it need not ; as the arbitrator was *functus officii* when he had made his award, and had it ready to be delivered ; and that, prior to actual delivery, the award was complete : but LAWRENCE, J. says, that if the arbitrator delivered his award, under seal, as a deed, it must then have a deed stamp ; but that if it were not delivered as a deed, though it were by writing, under seal, the common award stamp would be sufficient. There are numberless acts done by deeds which contain nothing of contract : a licence may be by deed ; on a fine without a deed to lead the uses, the uses would result to the party himself, and yet he may, by deed, declare the uses to himself for life, to his wife for life, to his first and other sons in tail, &c. ; and yet in all this there is nothing of contract. It has been said, that the covenant contained in this power of attorney is nugatory ; but it was introduced on very great advice ; and it is clear that no man can appoint another to be attorney to his executors, and much less to his administrators, therefore the death of the party would put an end to the power ; and the covenant is, therefore, necessary to secure the Bank as to acts done by the attorney after the death of the party, and before they are apprised of it. The case of a covenant never to sue being pleaded as a release, has been pushed too far ; for, though

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exception of my Brother GRAHAM, who doubted, thought it was a capital offence, though the form of the power was not according to the act of 45 Geo. 3: and ten of the Judges thought, that, since that act, it was a deed; my Brother GRAHAM and myself being of a different opinion.

Bosanquet, Serjt. I have understood that ten of the Judges thought the conviction good under the statute 2 Geo. 2.

GRAHAM, B.—I think that it was so.

PARK, J.—In 1787, *Sophia Pringle* was convicted before GOULD, J., and THOMSON, B., of uttering a deed, which was a power of attorney.

Bosanquet, Serjt. On these grounds I submit that the present conviction is right.

Brodrick, in reply. It has been contended, that the true definition of a deed is, a writing signed, sealed, and delivered; and some loose *dicta* are brought forward to support this proposition, in answer to the high authorities I have quoted: and if this were the true definition, a notice to quit, or a will, would be deeds, if signed, sealed, and delivered, which clearly would not be so. There must be, in addition, a contract or a grant to make it a deed. The deed to lead the uses does the argument no good, as it must be either a contract or a grant, and conveys an interest: so does a release, or a confirmation, or a disclaimer; but this power of attorney conveys only a bare authority. In the stamp acts the Legislature rank powers of attorney and deeds under different heads; powers of attorney bearing a different stamp from deeds.

BAYLEY, J.—Bonds and mortgages, though deeds, pay different stamp duties.

quet, Serjt. The term *deed* in the stamp acts leads not otherwise charged.

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ick. I was called on to cite cases, on the point venant not to sue must be pleaded as a release; authorities on that point are, *Deux v. Jefferies*, z. 352; *Hodges v. Smith*, lb. 623; *Ayliff v. Aire*, 1 Show. 46; and the judgment of BULLER, *Smith v. Mapleback*, 1 T. R. 446. On the second He contended, that, though for some purposes of attorney might be deeds, yet, as to the forgery the Legislature always considered them as matter of late legislation, distinct from deeds; and that, they were not within the purview of the statute c. 25.

Judges reported their opinions to the King in and the prisoner was subsequently executed.

on to the cases cited by
 d for the Bank, there
 and *Lewis*, reported by
 e FOSTER in his very
 in Crown Law (p. 116).
 mer was indicted for
 forged deed, which
 to be a power of attor-
 seal, from the admini-
 a deceased marine.
 ceived very great con-
 and the point princi-
 it was, whether it was
 fence to forge the name
 who did not exist, *e. g.*
 of a person who had
 r. The twelve Judges
 was: and their Lord-
 "The offence the pri-
 th charged with is, the
 as true a certain false,
 counterfeited deed, pur-

porting to be a power of attorney
 from Elizabeth Tingle, with an
 intention to defraud, knowing it to
 be false. This is her offence; and
 it is one of the offences described
 in the act: for, it is to be observed,
 that the act, in describing the of-
 fence, doth not use the words, 'the
 deed of any person,' or 'the deed of
 another,' or any words of like im-
 port, but any false deed. *Is the deed
 in question then a false deed, or is
 it not?—Undoubtedly it is. Was
 it published with an intention to
 defraud?—It certainly was. This
 being so, it would sound very
 harsh, to say, that the prisoner's
 case is not brought within the let-
 ter and meaning of the act, be-
 cause no such person ever existed
 as Elizabeth Tingle, the daughter
 of Richard."*

OXFORD SUMMER CIRCUIT.

1824.

BEFORE MR. JUSTICE PARK & MR. JUSTICE LITLEDALE.

BERKSHIRE ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE PARK.

1824.

July 26th.

REASON v. WIRDNAM.

A person cannot maintain an action for his trouble and loss of time in going to a place to become bail for another.

ASSUMPSIT for work and labour.

One of the items of the plaintiff's demand was, for his trouble and loss of time in going a journey to become bail for the defendant.

PARK, J.—I am clearly of opinion, that, if a person takes a journey to become bail for another, he cannot maintain an action against such person, for his trouble or loss of time in such journey; because, he does not undertake the journey as work or labour, or as a person employed by the defendant; but he does it as his friend, and to do him a kindness.

Verdict for the plaintiff, for the other items of his demand.

Taunton and Talfourd, for the plaintiff.

[Attorneys—*Dyne and Mayor.*]

(*Crown Side.*)

BEFORE MR. JUSTICE LITTLEDALE.

REX v. JOHN BAYLEY.

July 28th.

THIS prisoner was indicted for forging and uttering the ~~joint~~ acceptance of John Alexander and John Purkis, to ~~draw~~ bill of exchange, drawn by the prisoner, and made payable to his order. The prisoner brought it, with the forged acceptance on it, to a person named Shelley, and ~~indorsed~~ it to Shelley, to whom he paid it for a horse.

On an indictment for forging of the names of two joint acceptors, one release by the holder for valuable consideration to both of them jointly, is sufficient to make them competent witnesses to prove the forgery; and such release requires but one stamp.

To make Alexander and Purkis competent witnesses to prove their names forged, a release, to them jointly, was executed by Shelley, but it bore only one stamp.

The prisoner's counsel objected, that the release went to make *each* a competent witness; and therefore it ought to have borne two stamps.

LITTLEDALE, J.—As the liability was joint, the release might be joint to discharge it; and, I am of opinion, that if Shelley had given a release to one only of the two ~~joint~~ acceptors, it would have inured to the discharge of both.

A release to one of two joint acceptors, inures to discharge both.

The prisoner's counsel then objected, that the indorsee releasing the acceptors, might not be sufficient to destroy all their liability, as the prisoner, as drawer, might have some claim on their acceptance, though the indorsee had released his rights.

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LITTLEDALE, J. was clearly of opinion, that the acceptors were competent witnesses.

Verdict—Guilty.

Carrington, for the prosecution.

Curwood and *R. B. Comyn*, for the prisoner.

[Attornies—*Frankum* and *Compigny & Darvel*.]

It is usual on indictments for forgery, to call the party whose name is forged (he being released), to prove the forgery; but the forgery may be proved by persons acquainted with his handwriting, 2 Ea. P. C. 1002: and, in *Newland's* case, LE BLANC, J., allowed the forgery of the signature of a Cashier of the Bank, to a bank note, to be proved by a person acquainted with his handwriting; though such cashier might have been called, even without release, as he had no interest whatever in proving the note to be forged. But admitting this mode of proving a forgery to be sufficient, in point of law, which it certainly is, in a case so highly penal as forgery, a jury, using a very proper caution, will not, in general, convict, without the very best evidence that can be procured, is adduced; and, therefore, it is expedient to call the party whose name is forged, and release him, if necessary; and, if that is not done, and the prosecutor relies on other proof of the forgery, he may very confidently anticipate the acquittal of the prisoner. Where the forgery is by altering a genuine instrument, it is usual to add a set of counts,

charging the forgery to be by altering; but it was held, in the case of *Rex v. Teague*, Bay. on Bill, 480 that, where a man altered a 10*l.* note to 50*l.* he was rightly convicted of forging a note for 50*l.* And in *Rex v. Elsworth*, Ib. the like was held; where the prisoner was charged with the uttering, and the alteration was by making eight into eighty. Great care ought always to be taken in setting out the forged instrument in the indictment: it must be set out exactly as it is; and if, by mistake, a word is inserted or omitted, the mistake must be copied in the indictment; and so figures must be set out as figures; abbreviations set out as they are, and the like: and, where the instrument does not appear, on the face of it, to be within any of the statutes against forgery, there must be proper averments to shew that it is so; as, where a forged receipt is given on a navy bill, by merely writing the party's name on it; in such a case, there must be averments, that the signing the name imported a receipt; and, where the meaning is necessary to be shown, and does not sufficiently appear from the instrument itself, there must be innuendoes.

OXFORD ASSIZES.

(*Crown Side.*)

REX v. SAMUEL KESSAL.

July 30th.

THIS prisoner was indicted for cutting George Barefield, with intent to murder, or do him grievous bodily harm.

The prisoner, on the night in question, was returning from a revel to Caversham, when he was overtaken by the prosecutor. Both were intoxicated, and a quarrel ensued; the prosecutor struck the first blow, and they fought for a few minutes, when the prisoner ran back a short distance, and the prosecutor pursued, and overtook him; on which the prisoner, who had taken out his knife in his retreat, gave the prosecutor a cut across the abdomen.

If two persons quarrel, and begin to fight, on equal terms, when one, finding himself not equal to his adversary, runs away, and, being pursued, draws his knife, and when overtaken by his adversary, stabs him; if death ensue, this would be only manslaughter; and, therefore, for such stabbing, the party cannot be convicted capitally under Lord Ellenborough's act. But if, before the conflict began, the party had drawn his knife in cool blood, in case death had ensued, the offence would have been murder.

Curwood, for the prisoner, contended, that he ought to be acquitted; because, if death had ensued, his client would only have been guilty of manslaughter: for, if two persons begin to fight on equal terms, and, during the conflict, the blood having become heated, one draw a knife, and death ensues, it will be but manslaughter; and this is very different from the case of a man going into the conflict with an original intention of using the knife: and he cited *Ea. P. C. tit. Homicide, 243*, where it is laid down, that "if on any sudden quarrel blows pass, without any intention to kill or injure another materially; and if, in the course of the scuffle, after the parties are heated by the contest, one kill the other by a deadly weapon, this will only be manslaughter:" and *Rex v. Taylor*, 5 Burr. 2793; *Snow's case*, Leach, 138, which go to confirm this doctrine.

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Cross, contra, submitted, that it would be a question for the jury to consider whether the prisoner was actuated by a malicious intent, ~~when he ran away~~ for the purpose of drawing the knife.

PARK, J.—The question that I shall leave to the jury is this, whether the prisoner ran back with a malicious intention of getting out his knife, to inflict an injury on the prosecutor, and so gain an advantage in the conflict? for, if he did, notwithstanding the previous fighting between them on equal terms, and the prosecutor having struck the first blow, I am of opinion, that, if death had ensued, the crime of the prisoner would have been murder: or, whether the prisoner, *bonâ fide*, ran away from the prosecutor with intention to escape from an adversary of superior strength, but, finding himself pursued, drew his knife to defend himself? as, in this latter case, if the prosecutor had been killed, the crime would have been manslaughter only.

Verdict—Not guilty.

Cross, for the prosecution.

Curwood, for the prisoner.

[Attornies—*Blandy & Andrews* and *Looker*.]

In the case of *Rex v. Taylor*, 5 Burr. 2793, the prisoner and deceased had quarrelled in an ale-house, and the prisoner, who was a soldier, struck the deceased with a small cane; a scuffle and abusive language ensued, and the deceased and others proceeded, with considerable violence, to turn the prisoner out of the house; on which, the prisoner drew his sword, and turned round and killed the deceased. The Court of King's Bench, after taking time

to consider, held the offence of the prisoner to be manslaughter only. In *Snow's* case, the prisoner, who was a shoe-maker, was cutting the heel of a shoe with a common shoemaker's knife; and the deceased (some previous ill language having passed), seized the prisoner by the collar, and both rolled down into the cart-way: while they were struggling on the ground, the prisoner being undermost, and the deceased upon him, the prisoner stabbed the de-

passed with the knife that he still held in his hand ; on inspection, it appeared, that the deceased had received three wounds from the knife; of one of which he died. After great argument and consideration, the Judges held this to be manslaughter.—Through the

whole current of authorities, the Judges appear to place the question on this point,—Whether the prisoner was originally actuated by malice in the outset, or whether his passion was first inflamed by something done to him by the party killed ?

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WORCESTER ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE LITTLEDALE.

DAVIES v. BINT, COOKE, and Others.

August 2nd.

INFORMATION exhibited in the Crown Office against the defendants, for using dogs and snares for the destruction of game, whereby they had forfeited 5*l.* to the informer for each offence (a). Three of the defendants

On an information filed in the Crown Office, to recover penalties under the game laws, notice to a de-

fendant in custody, indorsed on a copy of the information, to appear and plead or demur, or a plea and appearance will be entered for him under the statute 48 Geo. 3, c. 58, is not good, as that statute does not apply to informations of this sort.

On such an information, if a verdict passes in favor of one defendant, and against another, the acquitted defendant is not entitled to his costs.

Whether, on the trial of such information, it is necessary that a defendant in custody, who has not employed either attorney or Counsel, should be brought into Court at the time of the trial ? and if it is necessary that he should, whether he should be brought up by an order of the Judge of Nisi Prius, or by *habeas corpus*.—*Quære*.

(a) Penalties under the game laws are often sued for by information filed in the Crown Office, as all penalties may be, which are recoverable "by bill, plaint, information," &c.: and, to do this, an

affidavit must be made of the facts of the case, and left with one of the clerks in Court of that office, who will prepare the information; which ought to consist of at least as many counts as there are penal-

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 & Others.

were in custody under an attachment founded on this very information, and had not retained any Counsel to defend them on the trial. It was, therefore, considered necessary that they should be in Court at the time of the trial; and the plaintiff's Counsel applied to the learned Judge for his order to the keeper of the county gaol to bring them up.

LITTLEDALE, J., had never known such an order made, and was by no means sure that he had authority to grant it: this was a mere issue between these parties, sent out of the Court of King's Bench to be tried, and he did not see how, as a Judge of *Nisi Prius*, he could make such an order.

ties to be recovered. This, when engrossed, the informer himself must, in open Court, deliver into the hands of the Master of the Crown Office, within six lunar months after the offence. The *venue* must be laid in the true county: and as soon as the information is filed, the informer's clerk in Court will issue an attachment, on which the defendant will be arrested, and held to bail in 10*l.* for his entering an appearance in the Crown Office; and if he does not put in such bail, he is thrown into prison, and there remains, without a trial, till he causes an appearance to be entered, by a clerk in Court, in the Crown Office; a period, where the party is ignorant and poor, (which is too often the case), amounting to months, and sometimes years; as, if no appearance is entered, he stays in prison till the informer has charity enough to discharge him. However, on such

appearance being entered, he is entitled to be discharged; and the informer's clerk in Court enters rules to plead; and the party pleads, in most cases, the general issue—not guilty; however, sometimes, a former conviction or acquittal (before a magistrate, or some other Court) for the same offence. The case is then tried like any other cause at *Nisi Prius*, no Attorney General's warrant of *habeas corpus* being required; and if the informer obtains a verdict, he has double costs, for which, with the penalty, a *fi. fa.* or *ca. sa.* may be issued. The practice on these informations will be very fully gone into, and precedents of the whole proceedings given, in the work of Mr. Gude, which is now in the press; and the law relative to these informations, is treated of at large in Mr. Curwood's Edit. of Hawk. P. C. b. 2, c. 25, p. 568.

The Counsel for the plaintiff then wished the keeper of the gaol to bring up those defendants, under an indemnity from Lord Plymouth, the real plaintiff.

1824.
DAVIES
v.
BINT, COOKE,
& Others.

Curwood. If the keeper brings them up under such an indemnity, he, being keeper of the *county* gaol only, must bring them through the *city* of Worcester, in which he, as keeper of the county gaol, can have no authority ; and therefore, by bringing them through the city, he would be guilty of permitting an escape.

The plaintiff's Counsel. These persons are not in the gaol on any other warrant ; and the plaintiff will undertake not to sue the keeper for any escape.

Carrington. Though the plaintiff may wave his action for an escape, yet, if the keeper is by these means guilty of permitting an escape, as soon as the parties are brought within the city, they may, if they please, refuse to remain in his custody ; and if he insists on detaining them, they may maintain actions against him for false imprisonment.

LITLEDALE, J.—There is no doubt that the keeper need not accept of any indemnity of any kind unless he chooses ; and I apprehend these defendants must either be brought up by order, or by *habeas corpus*. I will, therefore, as it is a new case, take it into my consideration, and determine on the proper course (b).

(b) This species of information being a mere civil proceeding to recover penalties, which, as Mr. Justice HOLROYD observes, are in Law a debt to the informer as soon as he sues for them, it seems to be no more necessary to bring up the defendant, than it would be in an

action of debt for a penalty ; but, if it were necessary, it is difficult to see how a Judge of *Nisi Prius*, as such, can make orders relative to prisoners in the gaol ; and, therefore, a writ of *habeas corpus* would seem to be the proper mode.

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 v.
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 & Others.

However, before the learned Judge had decided on this point, the keeper was prevailed on to bring them up on an indemnity; but, before the case was gone into, they stated, that they had been imprisoned seven months on this information, without having been tried, and that they had now had no sufficient notice of trial; and that they were not prepared to defend themselves, and had not their witnesses in attendance.

The plaintiff's Counsel wished to go on, and said, that in cases of this sort, defendants were only entitled to the notice of trial indorsed on the information, under the statute 48 Geo. 3, c. 58; and the learned Judge allowed the trial to proceed, as every thing was admitted to be regular as to *Cooke*; and if the other defendants were irregularly tried, they would have the advantage in another stage.

Verdict.—*Cooke* Not Guilty; the others Guilty.

Jervis, Taunton, and Russel, for the plaintiff.

Curwood and Carrington, for the defendant *Cooke*.

[Attornies—*Robeson and Gowland*.]

COURT OF KING'S BENCH,

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITLEDALE, JS.

In Bank.

Nov. 9th.

Curwood, who was now instructed on the behalf of the three defendants against whom the verdict had passed, now moved to set aside the verdict against them, and that they should be discharged out of custody, on the ground

stat. 48 Geo. 3, c. 58, did not apply to informations recovery of penalties. These defendants had been into custody, under an attachment issued out of the Office.

~~1834~~
DANES
BENT, COOK,
& Others.

MEDALE, J.—Under this sort of attachment you be party to bail in 10*l*. for his entering an appearance on doing which, he is entitled to be discharged.

wood. The parties were in custody, and were with a copy of the information in the gaol, with a indorsed, that, unless within eight days after the ry they caused an appearance and plea or demurrer entered, an appearance and plea of not guilty would eral in their names, pursuant to the statute; and be issue to be joined thereon would be tried, &c. otice of trial was certainly irregular, being before oined, whether these informations were within the 48 Geo. 3, c. 58, or not: the plea and appearance doo irregular, if, as he contended, these informations not within that statute (c). The statute regarded offences to be prosecuted by indictment or infor-

he stat. 48 Geo. 3, c. 58, iting that it was expedient ad the provisions of the Geo. 3, c. 77, and 85 Geo. , enacts, "That whenever ion shall be charged with nce, for which he or she prosecuted by indictment mation in his Majesty's f King's Bench, not being or felony, and the same made appear to any Judge ume Court by affidavit, or ficate of an indictment or tion being filed against ron in the said Court for ence, it shall and may be for such Judge to issue his

warrant under his hand and seal, and thereby to cause such person to be apprehended and brought before him or some other Judge of the same Court, or before some one of his Majesty's Justices of the Peace, in order to his or her being bound to the King's Majesty with two sufficient sureties, in such sum as in the said warrant shall be expressed, with condition to appear in the said Court at the time mentioned in such warrant, and to answer to all and singular indictments or informations for any such offence; and in case any such person shall neglect or refuse to become bound as aforesaid, it

1824
 DAVIES
 v.
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 & Others.

mation, not being treason or felony;" which certainly did not include cases of pecuniary penalties recoverable by common informers. The statute also spoke of the party being brought up for judgment, which never was done in cases of pecuniary penalty; of the "prosecutor," and of the plea being not guilty, whereas the plea might be *nil debet*. It also mentions the party being "acquitted;" and further, this sort of notice could in no case be given, unless where the party was in custody on a Judge's warrant, or a *capias ad respondendum*, whereas these defendants were in custody on an attachment.

ABBOTT, C. J., observed, that it was important that the practice should be settled. And the Court granted a rule to shew cause why there should not be a new trial, and ordered that a *supersedeas* should be issued to discharge the defendants out of custody, on their appearance being entered.

Nov. 22nd.

Taunton and *Russel* now shewed cause; and con-

shall be lawful for such Judge or Justice respectively to commit such person to the common gaol of the county, city, or place where the offence shall have been committed, or where he or she shall have been apprehended, there to remain until he or she shall become bound as aforesaid, or shall be discharged by order of the said Court in Term time, or of one of the Judges of the said Court in Vacation; and the recognizance to be thereupon taken shall be returned and filed in the said Court, and shall continue in force until such person shall have been acquitted of such offence, or, in case of conviction, shall have received judgment for the same,

unless sooner ordered by the said Court to be discharged; and that where any person, either by virtue of such warrant of commitment as aforesaid, or by virtue of any writ of *capias ad respondendum* issued out of the said Court, is now detained or shall hereafter be committed to and detained in any gaol for want of bail, it shall be lawful for the prosecutor of such indictment or information to cause a copy thereof to be delivered to such person, or to the gaoler, keeper, or turnkey of the gaol wherein such person is or shall be so detained, with a notice thereon indorsed, that unless such person shall, within eight days from the time of such delivery of

that these informations were within the statute 3, c. 58; because, using a net for the destruction was punishable by imprisonment, by the statute 12, c. 13, and by 5 Anne, c. 14; and therefore clearly an offence.

1824
DAVIES
v.
BINT, COOKE,
& Others.

EDALE, J.—There is no doubt that destroying an offence.

BY, J.—This act only applies to this Court; and penalties are recoverable in any Court at West-

the indictment or information aforesaid, cause an appearance, and also a plea or defence to be entered in the said Court, such indictment or information, an appearance and the plea of not guilty will be entered in the name of such person in case he or she shall appear for the said space of 14 days after such delivery of the indictment or information aforesaid, neglect to appear, and also a writ of habeas corpus to be entered in the Court to such indictment or information, it shall be lawful for the prosecutor of such indictment or information, upon an affidavit made and filed in the Court, of the delivery of a copy of such indictment or information with such notice indorsed thereon as aforesaid, to such person or his gaoler, keeper, or other person, as the case may be, which may be made before any Justice of the Peace or Commissioner of the said

Court authorised to take affidavits in the said Court, to cause an appearance and the plea of not guilty to be entered in the said Court to such indictment or information, for such person, and such proceedings shall be had thereupon as if the defendant in such indictment or information had appeared and pleaded not guilty according to the usual course of the said Court; and that if upon the trial of such indictment or information any defendant so committed and detained as aforesaid shall be acquitted of all the offences therein charged upon him or her, it shall be lawful for the Judge before whom such trial shall be had, although he may not be one of the Judges of the said Court of King's Bench, to order that such defendant shall be forthwith discharged out of custody as to his or her commitment as aforesaid, and such defendant shall be thereupon discharged accordingly."

1804
DAVIS
 v.
BURT, COOKE,
& Others.

HOLROTH, J.—These penalties, when subd for, are, in Law, a debt due to the informer.

Russel. The statutes recited in this act are, 26 Geo. 3, c. 77, § 18, and 35 Geo. 3, c. 96, which relate to obstructing Excise officers only; but the statute 45 Geo. 3, c. 10, § 41, enacts similar provisions for informations or indictments for offences against the quarantine laws; some of which are punishable by pecuniary penalties.

ABBOTT, C. J.—But some of them are punishable by indictment.

Russel. Mr. *Curwood*, in moving, relied much on the words “offence” and “acquittal;” but those words are continually applied on these informations by Blackstone and Hawkins; and it has been the uniform practice of the Crown Office to give this sort of notice to defendants in custody on these informations, the same as is done on indictments.

Curwood and *Carrington*, *contra*, were stopped by the Court.

ABBOTT, C. J.—Where a statute only regards offences punishable by indictment or information, not being treason or felony, can we say that under those words an information by a common informer for the recovery of a pecuniary penalty is included? and ought a man to be taken under a Judge’s warrant, and held to bail, for a mere pecuniary penalty?—No such thing was ever heard of.

Rule absolute.

Nov. 24th.

Curwood moved, that the Master should tax the defendant *Cooke* his costs, he being acquitted, though a verdict had passed against his co-defendants: and he relied

on the words of the statute 18 Eliz. c. 5, § 3, that, "if the informer shall have the trial or matter past against him by verdict or judgment of Law," the informer shall pay the costs; and he argued that the matter passed against the informer, as far as this defendant was concerned.

1834
Drury
v.
Barr, Coombs,
& Others.

Per Curiam.—The language of this statute is so similar to that of 28 Hen. 8, c. 15, on which the opposite construction has been put, that the Court think they cannot award costs to one of several defendants, who is acquitted, a verdict passing against the others.

Rule refused.

PIERPOINT v. SHAPLAND.

August 4th.

ACTION for words spoken of the plaintiff, a surgeon and apothecary, imputing to him want of medical skill. **Pleas**—1st, General Issue; 2nd, that the words were true.

The speaking of the words having been proved, the plaintiff's Counsel suggested, that the defendant should enter on his defence on the justification of the truth of the words, and then, they (the plaintiff's Counsel) should go into evidence to disprove such justification.

LITTLEDALE, J.—When affirmative pleas of justification are put on the record with the general issue, the plaintiff's Counsel may, if they please, not only prove the facts of the declaration, but also may, in the first instance, and before the defendant's case is gone into at all, go into any evidence which goes to destroy the effect of the justifications, by way of anticipating the defence: or they may, if they please, content themselves with proving the

such evidence as goes exactly to answer the case attempted to be made out by the defendant in support of his pleas.

If affirmative pleas are pleaded with the general issue, the plaintiff may, if he chooses, give in evidence any matter that goes to destroy the justifications, so pleaded by way of anticipating the defence; or he may content himself with proving the facts alleged in the declaration, and let the defendant make out what he can in justification, and trust to answering it by evidence in reply; but if he does this, he will be restricted to

1823.
 PIERPOINT
 v.
 SHAPLAND.

fact on the general issue, and then close their case, leaving the defendant to make out his justifications as he can, and afterwards go into evidence in reply, as to the justifications. But if the plaintiff's Counsel, knowing by the pleas what the defence is to be, close their case, and trust to evidence in reply, they are to be restricted to such evidence as goes exactly to answer the case proved, or attempted to be proved by the defendant in support of the justifications, and they cannot be allowed to go beyond it.

Verdict for the plaintiff—Damages, 80s.

Jervis, Campbell, and Ryan, for the plaintiff.

Russel and C. Phillips, for the defendant.

[Attornies—*Parker and Long*.]

STAFFORD ASSIZES.

(*Civil Side*.)

BEFORE MR. JUSTICE PARK.

August 9th.

HAYWARD v. GRANT.

In trespass
*quare clausum
 fregit* on several days. Plea, leave and licence to the whole. If some of the tres-

TRESPASS *quare clausum fregit* on a certain day, and on divers other days, &c. Pleas—1st, General issue; 2nd, Leave and licence as to the whole of the alleged trespasses. There was no new assignment, but a replication *de injuria*.

passes were committed after the licence was revoked, the plaintiff need not new assign, as the defendant, by his plea, undertakes to prove a licence sufficient to cover all the acts of trespass.

If the plaintiff is tenant of A., and has agreed that A. shall give three persons licence to sport over the lands, and the defendant has such a licence from A., such a licence will not support the plea of leave and licence by the plaintiff.

Before the case was gone into, *Campbell*, for the defendant, observed, that the plaintiff's case was, that there had been several acts of trespass, some committed under a licence, and some, after that licence had been revoked. Now, if the plaintiff meant to go on these latter, he should have new assigned, instead of replying as he had done.

1824.
HAYWARD
v.
GRANT.

PARK, J.—Does the licence cover every day?

Curwood. It does my Lord: and I submit, that though if the plaintiff had declared on *one* act of trespass, and leave and licence had been pleaded, and the plaintiff had intended to go on some act of trespass after the licence was revoked, he must new assign: yet, if many trespasses are declared on, as they are here, under the words “and on divers other days,” and leave and licence is pleaded to the whole of them; if some of the acts of trespass are before a revocation of the licence, and some after, it is sufficient to deny the leave and licence pleaded, without new assigning. And he cited *Barnes v. Hunt*, 11 East, 451 (a).

PARK, J.—Under that authority the case must be gone into.

It was then proved, on the part of the plaintiff, that he gave the defendant notice not to trespass on his lands; and that, afterwards, the defendant came on his lands, and shot one of the plaintiff's tame ducks.

(a) In *Barnes v. Hunt*, 11 East, 451, the plaintiff had declared for trespasses committed on divers days. Plea—leave and licence to the whole. Replication—*de injuria*. The defendant gave evidence

of a licence which covered some but not all the acts of trespass; and the Court of King's Bench held, that the plaintiff was entitled to recover without having new assigned.

1824
HAYWARD
v.
GRANT.

Campbell, for the defendant, opened, that the plaintiff held the lands under a person named Ogle, subject to an agreement for Ogle, and persons authorized by Ogle, to come on the lands to sport; and that Ogle gave such an authority.

Curwood. It is a clear principle of law, that if a man, having a licence, exceed his licence, he is a trespasser *ab initio*. Now, here, though the defendant might have leave to come on the land to sport, yet, if he came on the land to shoot tame ducks, that was not within the licence, and he would therefore be a trespasser.

PARK, J.—We had better have evidence of what the licence exactly was.

For the defendant, an agreement, under which the plaintiff held the land of Ogle, was put in. It reserved to Ogle a liberty of fishing and sporting over the land; and further provided, that he should have power to authorize any other persons to do the like; but that the *plaintiff* should not have authority to permit others to do so: and it was proved that Ogle had given such an authority to the defendant.

The plaintiff's counsel then objected, that the defendant had pleaded a licence from the *plaintiff*, and had given evidence of a licence from the *plaintiff's lessor*, which licence, it was contended, the lessor had a right to give under a particular agreement. The evidence, therefore, did not support the plea of licence by the plaintiff, and they had even shewn that such a licence could not be given by the plaintiff.

PARK, J.—On the plea of licence, I am with the plaintiff: but I think I had better nonsuit; because it may be a question, whether this was the land of the plaintiff for

this purpose; for, if it were not the land of the plaintiff for this purpose, I think the defendant would be entitled to a verdict on the general issue.

1824.
HAYWARD
v.
GRANT.

Nonsuit, with liberty to move to enter a verdict for the plaintiff.

Curwood and *Bale*, for the plaintiff.

Campbell, for the defendant.

[Attornies—*Jones* and *Wood*.]

COURT OF EXCHEQUER.

BEFORE ALEXANDER, C. B., GRAHAM, GARROW, AND
HULLOCK, BS.—In Bank.

Bale moved, in pursuance of the leave given by the learned Judge at the trial, to enter a verdict for the plaintiff.—The Court granted a rule to shew cause.

Nov. 10th.

GREEN, Executrix of BOWERS, v. DAVIS.

August 9th.

ASSUMPSIT on a promissory note, with the common money counts, brought by the plaintiff as executrix of her former husband. Pleas—the general issue, and the statute of limitations.

The note was in the following form :—

“December, 28, 1813.

“Received of Mr. Daniel Bowers one hundred pounds, which I promise to pay on demand, with lawful interest,

Joseph Davis.”

Whether a plaintiff can recover on an instrument in the following terms: “Received of Mr. D. B. 100*l*. which I promise to pay on demand, with lawful interest, J. D.” on an agreement-stamp, and a three-penny receipt stamp—*Quare*.

1824
 GREEN,
 Executrix of
 BOWERS,
 v.
 DAVIS.

This was written on a three-penny receipt stamp; and a one pound agreement stamp had also been put upon it at the Stamp Office, on payment of the penalty.

To take this case out of the statute of limitations, a witness proved, that on an application being made to the defendant to send Mrs. Green "a little of her interest money," the defendant said, that he would bring her money on the next Sunday week.

Taunton, for the defendant, objected, that as the paper in question had not any note stamp, it was not admissible in evidence as a note; and as a three-penny stamp was not proper for a receipt for a hundred pounds, it was not admissible in evidence as a receipt.

The plaintiff's Counsel contended, that, stamped as it was, it was admissible in evidence as an acknowledgment of so much of the plaintiff's money being in the defendant's hands, which would entitle the plaintiff to a verdict on the count for money lent.

PARK, J. directed the jury to find for the plaintiff.

Verdict for the plaintiff.

August 9th.

GREEN v. DAVIS.

Whether one admission of liability to pay a debt can be applied to two distinct causes of action between the same parties—*Quære*.

THIS case was between the same parties as the last, and was on another promissory note: but, in this case, the plaintiff sued in her own right, and not as executrix. In this case, as in the former, the statute of limitations was pleaded.

The note was in the following form:—

"February 18, 1816.

"Received of Mrs. Betty Bowers eighty pounds, lawful money, which I promise to pay on demand.

Joseph Davis."

1824.
GREEN
v.
DAVIS.

This note bore the same stamps as the note sued on in the former case, and *Taunton* repeated his objection.

To take the case out of the statute of limitations, the same admission of the defendant, which was used in the former case, was again given in evidence.

Taunton said, that, however this acknowledgment might operate in the former case, it could not apply in this; for, besides that such an admission could only operate once, it plainly applied to the former note, as it respected interest-money, that note carrying interest, which this did not.

PARK, J., in this case also directed a verdict for the plaintiff.

_____ for the plaintiff.

Taunton, for the defendant.

[Attornies—*Lee* and *Maudesley*.]

COURT OF KING'S BENCH,

BEFORE ABBOTT, C.J., BAYLEY, HOLROYD, & LITLEDALE, JS.
In Bank.

Taunton now moved for a new trial in both the actions, on the objections taken by him at the former trial; and the Court granted a rule to shew cause in each case.

Nov. 6th.

See the cases of *Firbank and Another v. Bell*, 1 B. & A. 36; and *Butts and Others, Assignees of Fosset and Others, v. Swann and Others*, 4 J. B. Moore, 484.

SHROPSHIRE ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE PARK.

August 12th. REX v. RICHARD BEACALL; Same v. GEORGE WELLING.

Held by the twelve Judges, that, if a servant receives money on his employers' account, and embezzles it, he is guilty of a felony, though his employers had no right to it, and were wrong doers in receiving it.—Held, that if under an act of Parliament, the property in goods, chattels, furniture, clothing, and debts, are vested in certain directors of the poor; yet the property in money, and securities for money, are not vested in them by those words.

In an indictment for embezzling money, it is not necessary to state from whom the money so embezzled was received.

THESE prisoners had been tried at the preceding assizes, and their cases reserved for the consideration of the twelve Judges (see *ante*, pages 310—315); and as soon as the grand Jury had been sworn, the prisoners were placed at the bar.

PARK, J. addressed them to the following effect:—You were severally indicted at the last assizes, for embezzling the monies of your employers; and to the indictments found against you several objections were made; among them, were two on the facts proved, and one in arrest of judgment. On the facts of the case against you, Richard Beacall, it was objected, that the money embezzled by you (a composition for a bastard child), was money not due to your employers, and money which they could never have recovered; and that, as it was never their money, you could not be guilty of the crime of embezzlement, in converting it to your own use. I, at first, thought there was something in this objection. I was attracted by the ingenuity of it. But, on consideration, I am convinced there is nothing in it; for it is clear that you received it for, and solely on account of your employers, and by virtue of your employment, and afterwards secreted and embezzled it. The 2d objection, on the facts of both your cases, is, that, by a most confused act of Parliament, a corporation of

guardians of the poor are constituted, and every count in the whole of the indictments against you states the monies embezzled to be the property of the directors; whereas, under the terms of this act, the property is in the guardians. This I considered to be fatal. However, I reserved the point for the opinion of the twelve Judges, who are unanimously of opinion that it is so; and, on this ground, his Majesty has been pleased to grant his most gracious pardon to you both. The point in arrest of judgment was, that the indictments did not state from whom the money embezzled had been received: but, as the indictments follow the words of the statute, and state that the money was received by you for your employers, and by virtue of your employments, the Judges are unanimously of opinion, that that is sufficient, without saying from whom the money was received. His Majesty's pardon only relates to the two indictments on which you have been convicted. The other indictments, on which you were not tried (fourteen in number), are, however, all open to the second objection; but they cannot be quashed, because there is nothing vicious on the face of them, and the only defect is, that the allegations contained in them cannot be supported by proof. Therefore acquittals must be taken on them.

1824.
 Rex
 v.
 BEACALL.
 Rex
 v.
 WELLINGS.

Verdicts of not guilty were then taken on the other fourteen indictments.

No pardon under the Great Seal had been actually granted for either of the prisoners; but for each of them a sign manual of his Majesty, under his privy signet, and countersigned by Mr. Secretary Peel: one of which ran—

“GEORGE R.

“Whereas, Richard Beacall was, at the last assizes holden for our county of Salop, tried and convicted of robbing the *Directors of the Poor of Shrewsbury*.”

1824
 REX
 v.
 BEACALL.
 REX
 v.
 WELLINGS.

It then stated it to be his Majesty's intention to grant him a free pardon "for his *said crime*," and that his name should be inserted in the next general pardon for the Oxford Circuit. The other sign manual was similar, with only a change of the name.

The prisoners' Counsel, on this, suggested that neither of the prisoners could be indicted again for the crime so pardoned, though in such second indictment the property might be laid in the Guardians of the Poor, because his Majesty's pardon applied to the offence itself and not the mode of laying it.

However, this point was not decided, as the indictments subsequently preferred were for distinct offences, not included in any of the former indictments.

Bather and Russel, for the prosecution.

Curwood and Slaney, for the prisoner Beacall.

Curwood and Carrington, for the prisoner Wellings.

[Attornies—*Cooper*, for the prosecution; *Watson & Harper*, for Beacall; and *Nock*, for Wellings.]

Pardons, are either general pardons by act of Parliament, or special pardons under the Great Seal; and even the former must be pleaded if there are any persons excepted out of their operation; and if there be, which always has been the case, the prisoner must, by pleading, aver that he is not one of the excepted parties. A pardon under the Great Seal must be always pleaded; but in cases

where the King's pardon has not passed the Great Seal, the Judge of assize will, on the production of his Majesty's sign manual, (if the prisoner is not detained on any other charge) admit him to bail, in a recognizance, conditioned for him to appear and plead his pardon. By the stat. of 13 Rich. 2. c. 1, the King's pardon does not extend to the pardoning of treason, murder, or rape, unless such of-

are pardoned in express and, in all cases, his Majesty's pardon under the Great Seal could receive a most narrow construction; but, I believe, it is in such pardons, for his Majesty to extend his pardon to the prisoner in whatever manner it may be framed; and also whether the prisoner has been indicted for it or not every charter of pardon depends on the express words used in it; but his Majesty's sign manual, expressing his royal power to pardon, receives a liberal construction, and is therefore not drawn up with any particular degree of formality. In actual practice, a plea of pardon is never seen, the prosecu-

tion being always considered at an end when his Majesty's sign manual is issued. For the law respecting the effect and construction of pardons, see Curw. Hawk. B. x. c. 37.

Another plea, which is certainly good, and so laid down in all the books, is, a plea that the prisoner is attainted, and that such attainder is still in force and unreversed. But this plea never has been used in modern times, and I believe there is no precedent of it in any printed collection, ancient or modern.

Pleas of *autrefois convict*, and *autrefois acquit*, are not uncommon.

1824.
 Rex
 v.
 BEACALL.
 Rex
 v.
 WELLINGS.

v. RICHARD BEACALL; Same v. GEORGE WELLINGS. August 13th.

THESE prisoners were indicted for embezzlement. The indictments were in the usual form, and charged the former prisoner, as steward, and the latter, as clerk, to be guardians of the poor of parishes in the town of Shrewsbury, in the county of Salop, and the suburbs thereof, and laid the property in that corporate body. Under the provisions of the private act of Parliament, by which they were incorporated, &c., see *ante*, page

The witness produced the written appointments of the prisoners to their respective situations of steward and clerk to the corporation. They bore date 1816, and were for one year next ensuing." It did not appear that any of them had been re-appointed. Other witnesses testified that they had paid them the several sums that

If a person is employed as the servant of a corporation, and embezzles their money, he is guilty of felony, though he was not duly appointed their servant, nor even appointed at all under the common seal.

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each was charged with embezzling in the course of the year 1823, and that they had not accounted for them.

The prisoners' Counsel contended, that, to make a person guilty of the crime of embezzlement, he must be the servant of the person whose money he embezzles; and he must receive it by virtue of his employment as a servant. Now these men were charged to be servants of a corporation; and a corporation must appoint its servants according to its powers, either by its common seal, or under the provisions of some act of Parliament. For the first year, these men were duly servants of the corporation; but as they were neither re-appointed under the common seal, nor according to the terms of the private act, their existence, as servants of the corporation, ceased at the expiration of that year; and they could not be continued as servants permissively, as a corporation can do nothing except under its common seal, or under some special power.

PARK, J.—I think this is sufficient. The statute 39 Geo. 3, c. 85, enacts, that if any person "employed in the capacity of a servant or clerk to any person or persons, body corporate or politic, shall embezzle," &c. (a); therefore, if the person be employed as a servant or clerk, he may be guilty of this crime, though he is not duly ap-

(a) The words of the stat. 39 Geo. 3, c. 85, are, "If any servant or clerk, or any person employed for the purpose in the capacity of a servant or clerk to any person or persons whomsoever, or to any body corporate or politic, shall, by virtue of such employment, receive or take into his possession any money, goods, bond, bill, note, banker's draft, or other valuable security or effects, for, or in the name, or on the account of

his master or masters, employer or employers, and shall fraudulently embezzle, secrete, or make away with the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master or masters, employer or employers," &c.; and the offender, and those who are accessories to his crime, are to be subject to transportation for any term not exceeding fourteen years.

pointed, nor even appointed at all under the common seal.

Verdict—Guilty (b).

Bather and *Russel*, for the prosecution.

Curwood, for the prisoner *Beacall*.

Curwood and *Carrington*, for the prisoner *Wellings*.

[Attornies—*Cooper*, for the prosecution ; *Watson & Harper*, for *Beacall* ; and *Nock*, for *Wellings*.]

(b) The prisoners were subse- years transportation
quently sentenced to fourteen

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BEFORE MR. JUSTICE PARK.

JONES v. JOHN WILLIAMS.

August 14th.

FALSE imprisonment. Plea—General issue.

For the plaintiff, it appeared, that a person named *Hughes*, with whom the plaintiff lived as a housemaid, had complained to the defendant (who professed to act as a deputy to *John Copner Williams*, one of the aldermen of the town of *Denhigh*), that the plaintiff had absented herself from her employment; on this complaint the de-

If a Justice of the Peace acts, believing that his jurisdiction extends to the subject matter in question, he is entitled to notice of action, though it may turn out, on in-

vestigation, to be a case over which no Justice of the Peace has jurisdiction. If the King, by charter, appoints two aldermen to govern a borough; and, by another clause in the charter, gives the aldermen authority to act as Justices of the Peace; and, by another clause, empowers such aldermen to appoint persons to be deputy aldermen; whether such deputy aldermen are also as deputy Justices of the Peace—Quære. And if they are, whether, as deputy Justices of the Peace, they are entitled to notice of action—Quære. Whether the statute 4 Geo. 4, c. 54, § 3, gives Justices authority over menial servants who misbehave in their service—Quære.—If a person claims a right to act as a Justice, he is entitled to notice of action, though the ground on which the plaintiff goes is a denial of such right.

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defendant caused a constable to bring the plaintiff before him; and he, after an examination, committed her for one month to the Bridewell at Ruthen, under a warrant, which was produced by the gaoler. The warrant was in the following terms:—

“Borough of Denbigh, }
to wit. } To the Constables, &c.

Whereas information and complaint has been made before me *John Copner Williams*, [the defendant's principal] one of his Majesty's Aldermen and Justices appointed to keep the peace in and for the said borough,—(it then stated the complaint of Margaret Hughes).—And whereas I have duly examined the proofs and allegations of both the said parties, touching the matter of the said complaint, and upon consideration had thereof, have adjudged and determined—(here followed the adjudication)—and I do hereby order, as a punishment for the said offence, that the said Elizabeth Jones—(it then ordered an abatement of her wages, and that she should be imprisoned for one calendar month).—Given under *my* hand and seal, &c.

(Signed)

J. C. Williams, }
by his deputy, John Williams. } [L. S.]”

However, after she had been in prison for ten days, the defendant ordered her to be liberated. The plaintiff was in fact never examined before the defendant's principal, Mr. John Copner Williams.

The defence was, that by a clause in a charter granted to the town of Denbigh by King Charles II., two aldermen are to be appointed; and they are empowered to execute by themselves, or, in their absence, by their deputies, “the offices of *aldermen*.” And by another clause in the same charter it was ordained, that the *aldermen*, during the time they should remain in their offices, should be Keepers and Justices of the Peace, and should have power to enquire, hear, and determine all matters which belong to the office

of a Justice of the Peace. One of the aldermen, named John Copner Williams, had gone out of the borough, and had appointed the defendant his deputy alderman; and the defendant acted as a deputy alderman at the time of this commitment.

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The appointment was in the following terms:—

“ Know all men by these presents, that I, John Copner Williams, of the Borough of Denbigh, and one of the Aldermen and Justices of the Peace in and for the said borough, have made, ordained, and deputed, and by these presents, by virtue of the power and authority given and granted in such cases by the charter of King Charles the Second, and all other powers and authorities me thereunto enabling, do make, ordain, and depute John Williams, of, &c. one of the capital burgesses of the said borough of Denbigh, and residing therein, to be an Alderman and Justice of the Peace in and for the said borough, in my place and stead, to do all legal acts relating to the said office in my name, and to hold, exercise, and enjoy such office during my absence from the said borough, or until another person shall be lawfully appointed to the office in my stead, according to the ancient usage of the said borough, and in pursuance of the said charter. In witness whereof I have hereunto set my hand and seal, the (6th November, 1823.)

Signed,

John Copner Williams, [L. S.]

Signed, sealed, and delivered, &c.”

Campbell, for the defendant, contended, that on these facts the plaintiff ought to be nonsuited. 1st. Because that, under the charter, the defendant was a Justice of the Peace. It was clear law, that, under particular charters authorising it, judicial offices might be delegated; that had been recently decided in the Court of King’s Bench (a): and, in point of fact, the Recorder of London appoints

(a) See the case of *Rex v. Mayor of Gravesend*, 4 Dow. & Ry. 117.

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a deputy, who tries criminal cases; and there have been instances of the Judges of Wales doing the like. And as by this charter the aldermen are to be Justices, and may appoint deputies, he contended that the deputy alderman was authorised to do all acts that the alderman might do if he were there, as well judicial as otherwise: and it clearly must be so; as in this place (one of the aldermen having left the town) there would be only one Justice remaining, if the deputy alderman did not make a second Justice; and the consequence would be, that all business requiring two Justices could not be done; and in that town there would be no authority to allow a poor's rate, remove a pauper, or do many other acts. *2nd.* That if the defendant acted as a Justice, he had authority to commit the plaintiff under the statute 4 Geo. 4, c. 84, § 3, which gave Justices a jurisdiction over all persons who have contracted to serve others, and have misbehaved in such their service. And *3rd.* That even if the defendant had exceeded his jurisdiction in committing the plaintiff, yet he was entitled to notice of action: and, further, that in this case the plaintiff was not entitled to try the question whether, under the words of the charter, the defendant had authority to act as Justice, without giving him previous notice of action, as he had, at all events, a fair claim of a right to act as such.

C. Phillips, Godson, and J. Jervis, for the plaintiff, contended, on the *first* point, that, however it might be lawful to delegate judicial powers under the express provisions of an authority from the Crown, yet that never ought to be allowed, unless such authority were clearly and explicitly given; and that here, by the charter, the defendant had no authority to act as a justice; for, that though the charter empowered an alderman, going out of the town, to appoint a deputy *alderman*, it no where empowered him to appoint a deputy *justice*; and it was to be

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d, that the power of acting as a justice, was a part of the office of an Alderman of Denbigh, but that was really so, as the only authority that any one had to act as a justice of that town, was the clause that the *aldermen* should be keepers and Justices of the Peace. Now this use, they contended, was not sufficient to justify the delegation of judicial powers to a deputy alderman; and at all the functions of a deputy alderman, *quod* deputy alderman, would be of a corporate, and not of a judicial nature. As to the *second* point, the stat. 4 Geo. 4, c. 34, enacts, that "If any servant in husbandry, or any shoemaker, calico-printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person, shall contract with any person or persons whomsoever, to serve him, her, or them," and shall misbehave, the justices shall have a jurisdiction to punish them by three months hard labour. It was, on this, contended, that this housemaid came within the description *other person*. Now, this phrase, clearly was not meant to comprehend menial servants, because another description of servants was expressly mentioned: namely, "servants in husbandry," and also because the words *other person*, being used with the words "miner, collier, keelman, pitman, glassman, potter, and labourer," clearly showed that the legislature meant other persons *ejusdem generis*. On the *third* point, they contended, that the defendant was not entitled to notice of action; for that, here, they not only contended, that the defendant had exceeded his authority if he were a justice, by committing a person over whom he had no jurisdiction, but they denied that he was a justice at all; and that though, if a man be admitted to be a justice, you must give him notice of action if he has exceeded his authority; yet, if he is not a justice at all, he is not entitled to any notice; and a person merely assuming to himself the powers of a justice, is not thereby entitled to notice of action.

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PARK, J.—On the construction to be put on the stat. 4 Geo. 4, c. 34, I do not feel myself bound to give any opinion; and as to the other points:—It is in the first place clear, that where judicial officers have a power given them by the Crown, in their appointment, to delegate their powers, they may lawfully do so; as has been instanced in the cases of the Recorder of London, and the Judges of Wales, who have such a power given them; but the Judges of England cannot delegate their powers, because no such authority is given them by the patents, under which they hold their offices. Under this charter from the Crown, the defendant claims a right to act as a justice of the town of Denbigh, by virtue of his office of deputy alderman; and I am clearly of opinion, that, as he claims, by virtue of this office, so to act, he is entitled to notice of action, if his claim to this right is disputed; and I think, that, no notice having been given in this case, the plaintiff must be nonsuited.

Nonsuit.

C. Phillips, Godson, and J. Jervis, for the plaintiff.

Campbell, for the defendant.

[Attornies—*Jones and Williams & Evans.*]

COURT OF KING'S BENCH.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITLEDALE, JS.

In Bank.

Nov. 7th.

Godson moved to set aside the nonsuit in this case, on three points. 1st. That the defendant was not by the charter entitled to act as a Justice of the Peace, for that he was only deputy as Alderman; and that judicial author—

as not allowed to be delegated, unless by the express words of some act of Parliament or charter. *2nd.* however a Justice might be entitled to notice of action against the defendant, being a deputy Justice, was not; and it should be observed that he did not act in his own name, but in the name of Copner Williams, his principal, appearing throughout the proceedings; and even the signature was "Copner Williams, by John Williams (the defendant), his attorney." And *3rd.* That even if he were a Justice, he had no authority over the plaintiff, as a domestic servant; therefore, as he was acting on a subject matter over which he had no jurisdiction, he was not entitled to notice of action.

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BOYD, C. J.—If he acted as a Justice, *bonâ fide*, he was entitled to notice of action, though he exceeded his authority.

BOYD, C. J. If he had authority over the subject matter of the offence, he would be entitled to notice; but if it is a subject matter in which no justice at all can have a jurisdiction, I submit that he would not be entitled to notice. And he cited *Prestidge v. Woodman*, 2 & Ry. 43.

BOYD, J.—If a Justice acts on a *bonâ fide* belief that he has authority over the subject matter, he is entitled to notice of action.

The Court granted a rule nisi, on the first and second points, and refused it on the third point.

In the case of *Molins v. Wetby*, 76, it is stated, that the Mayor of London, the Recorder of London, the Steward of the Borough Court of Southwark, all appoint deputies to do their duties. The Judge of the Palace Court is also a deputy to

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the Knight Marshal; and in the recent case of *Rex v. The Mayor and Jurats of Gravesend*, 4 Dow. & Ry. 117, Mr. Justice GAZLEE (then at the bar) said, *arguendo*,—"Undoubtedly, he (the Mayor) could have no authority to delegate his judicial functions, inasmuch as the charter makes no mention of any such power."

On the construction of the stat. 4 Geo. 4, c. 34, § 3, see the case of *Lowther v. Earl of Radnor and Another*, 8 East, 113, which was a case much considered as to the construction of the stat. 20 Geo. 2, c. 19, which, in many respects, resembles the act in question.

With regard to the notice of action to be given to a Justice, the case of *Prestidge v. Woodman*, 2 Dow. & Ry. 43, decides, that, if the place where the cause of complaint arises, is out of the Justice's jurisdiction, he is still entitled to notice of action; and the Court held, that where he acts *quâ* magistrate, though erroneously, he is entitled to it: and Mr. Justice BAYLEY

says, that "many cases have decided that, though the Justice exceeds his powers, yet, if he is acting *bonâ fide*, and under the supposition that he is right, he is entitled to notice; the object of the notice being, that, if he is wrong, he may set himself right by tendering amends." And in the case of *Weller v. Toke*, 9 East, 364, the Court held the Justice entitled to notice of action, though he alone had committed a person in a case in which not less than two Justices have jurisdiction. And in the case of *David v. Wilson*, 5 T. R. 1, it was held, that an Excise officer, acting in the supposed execution of his duty, was entitled to notice of action. In that case, the Excise officer had assaulted an innocent person, supposing him to be a smuggler then actually employed in running goods.

For more on this subject see the notes to *Levy & Edwards, ante*, p. 40.

HEREFORD ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE PARK.

August 16th.

PRICE v. BOULTBY.

Practice.—

When a copy of an agreement sued upon is delivered to the

defendant, in pursuance of a Judge's order for that purpose, the Judge will, in general, make it a part of that order that the defendant shall consent to make no objection to the stamp.

ASSUMPSIT on an agreement to build a house according to an annexed specification.

The agreement was put in. It had been stamped at

the stamp office (upon payment of a penalty of 5*l.*) with a one-pound stamp.

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Taunton objected to its being read, till it was ascertained whether the agreement, and the specification which was to be taken as part of it, contained more than 1080 words; for that if they did (however they might have been stamped at the stamp office), they required a stamp of 1*l.* 15*s.* As his client had no duplicate of the agreement, he could not prove that it contained more than 1080 words; but the copy delivered under a Judge's order contained more than that number.

PARK, J.—I think I ought not to admit these papers as evidence without the words being counted; but, in general, when a defendant asks as a favor to have a copy of an agreement sued upon, under the order of a Judge, the Judge will make it a condition, on the granting of such order, that he shall make no objection to the stamp; as such objections entirely defeat the justice of the case.

The associate was proceeding to ascertain whether there were more than 1080 words or not, when, at the suggestion of the learned Judge, the cause was

Referred.

Campbell and *Twiss*, for the plaintiff.

Taunton and *Cross*, for the defendant.

[Attornies—*Farlow* & *A.* and *Spencer.*]

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MOORE v. WILLIAMS.

That part of the statute 13 Geo. 3, c. 51, which relates to the plaintiff paying costs to the defendant in personal actions arising in Wales and tried in England, unless 10*l.* are recovered, is wholly repealed from the 24th June, 1824; and the 21st section of 5 Geo. 4, c. 106, enacting nearly similar provisions, except 50*l.* be recovered, did not come into operation till the 6th November, 1824: so that, in all actions tried between those days, neither of the statutes applies, and the plaintiff gets the same costs as if the cause arose entirely in England.

THIS case was referred to arbitration; and the arbitrator directed a verdict to be entered for the plaintiff, for 5*l.*, which was accordingly done.

COURT OF KING'S BENCH.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITTLEDALE, J.

In Bank.

Campbell moved to enter a judgment of nonsuit in this case. By the statute of 13 Geo. 3, c. 51, § 1, it was enacted, that, in all personal actions, where the cause of action arose in Wales, and the *venue* was laid in England, unless the plaintiff recovered 10*l.* there was to be a judgment, as in case of nonsuit, and the defendant was to be entitled to his costs. But by the 5 Geo. 4, c. 106, this statute is absolutely repealed; and it is enacted, (§ 21), that in all personal or transitory actions, commenced after the 6th of November, 1824, where the defendant is a resident in Wales, or the cause of action arose there, and the *venue* is laid in England, there shall be judgment, as in case of nonsuit, unless the plaintiff recovers 50*l.*, and the defendant shall have his costs. This statute received the royal assent on the 24th. of June, 1824. The present action was, therefore, tried after the passing of the statute 5 Geo. 4, c. 106, and, consequently, after the repeal of the older statute: but he contended, that, as this action was commenced before the older statute was repealed; and as no provision was made in the new statute for actions brought before the repeal in which verdicts were recovered after it; the repeal of the statute ought not, in fairness, to be taken to extend to them, as

none of the new provisions extended to them. And he cited *Ashburnham v. Bradshaw*, 2 Atk. 36, and *Gilmore v. Skuter*, 2 Lev. 227.

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ABBOTT, C. J.—The repeal of the old act is immediate; but can you find any authority to warrant such construction as you contend for—that the repeal of an act is not to extend to all cases, because the newly substituted provisions do not?

Campbell. If the construction I contend for does not prevail, in all actions commenced before the 6th of November, 1824, the smallest damages will now carry full costs; though by the act of 5 Geo. 4, the Legislature intended that nothing less than a verdict for 50*l.* should entitle the plaintiff to his costs.

BAYLEY, J.—It is better that that inconvenience should be submitted to, than to let in the evils of so bold a construction as that contended for.

Rule refused.

By the stat. 5 Geo. 4, c. 106, §91, it is enacted, “that in all actions upon the case for words, action of debt, trespass on the case, assault and battery, or other personal action, and all transitory actions, which, from and after the 6th of November, 1824, shall be brought in any of his Majesty’s Courts of Record out of the Principality of Wales, and the debt or damages found by the jury shall not amount to the sum of 50*l.*; and it shall appear upon the evidence given on the trial of the said cause, that the cause of action arose in the said Principality of

Wales, and the defendant or defendants was or were resident in the dominion of Wales at the time of the service of any writ or other mesne process, served in such action, and it shall be so testified by the Judge on the back of the *Nisi Prius* record, or the facts suggested on the record or judgment roll, a judgment of nonsuit shall be entered, and the plaintiff pay the defendant or defendants his or their costs; and the plaintiff shall be allowed, out of the costs, the sum awarded to him by the verdict; and though no judgment is entered for the plaintiff, yet the

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verdict, without any judgment, shall be a good bar against the plaintiff.

But, by § 22, nothing in this act is to preclude any person from bringing his action in England, and obtaining full costs, if the Judge certifies on the back of the record that the title or freehold of land was chiefly in question, or that the cause was proper to be tried in an English county.

In the case of *Ashburnham v. Bradshaw*, 2 Atk. 36, there was a devise to charitable uses under a will of 1734; but the testator lived till July, 1736, a month after the statute of mortmain passed, without altering his will; and it was referred by the Court of Chancery to the Judges, to say, whether this was a good disposition

to charitable uses; and all of them, except Mr. Justice DENTON (who was ill), certified that this bequest was good, notwithstanding the act, and the Chancellor decreed accordingly.

The case of *Gilman v. Shute*, 2 Lev. 227, was *assumpsit* to pay money for a marriage portion. The promise was made before the passing of the statute of frauds, and it was resolved by the Judges, that, though the statute says, that after the 24th day of June, 1677, no action shall be brought on any promise in consideration of marriage without writing, yet that does not extend to such a promise made before the 24th June, 1677; although the action on it may have been brought after that day.

August 17th.

REX v. DAVIS and Others.

In the *Nisi Prius* record of an indictment, removed by *certiorari*, the names of the grand jurors who found the indictment need not be inserted in the caption.

INDICTMENT for a riot and assault, found at the Great Sessions of Glamorganshire, and removed into the Court of King's Bench by *certiorari*.

In the caption of the indictment, as stated on the *Nisi Prius* record, the names of the grand jurors who found the bill were not set out; but it was only stated, that by the oath of *twelve* good and lawful men, sworn and charged to inquire, &c. it was presented, &c.

Campbell and *Maule* objected, that the names of the grand jurors ought to have been set out, because the defendants might shew that some of the persons who

formed the grand jury were incapable of being grand jurors, as that they were persons attainted, aliens, or the like.

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Ludlow, Russel, and Cross, contra. This, if it is an objection, is only to the caption of the indictment, and if the caption be defective, the Court of King's Bench will send it down again to the Great Sessions to be amended. And they cited 1 Chitty, C. L. p. 333, where it is stated, that the names of the grand jurors need not be set forth in the caption, and that it is the practice of the Crown Office to omit them.

Campbell, in reply, cited the case of *Rex v. Fearnley*, 1 T. R. 316, and contended, that the caption of an indictment might be demurred to, and certainly could not be amended after verdict.

PARK, J.—As the caption may be amended if it be wrong, I shall not stop the case on such an objection.

Verdict—Guilty.

Campbell and Maule, for the prosecution.

Ludlow, Russel, and Cross, for the defendants.

[Attornies—*Stokes and Griffiths.*]

COURT OF KING'S BENCH.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITLEDALE, JS.

In Bank.

Maule moved, that the attendance of the defendants to receive the judgment of the Court might be dispensed

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with, on the ground of their extreme poverty, they being all labourers, and residing more than 180 miles from London; their attorney undertaking to pay any fine that might be imposed on them.

The Court granted a rule to shew cause.

August 20th.

REX v. THOMAS and Others.

If an indictment state that an issue was joined at the "General Sessions" of our Lord the King, holden for the county of G., before his Majesty's Justices of the Court of Great Sessions: this will not be proved by shewing that such an issue was joined at the Great Sessions of that county. And if it is laid, that the issue was joined in an ejectment, in which "John Doe, on the demise of W. R. and D. T. was the plaintiff;" and it appears that John Doe was plaintiff on the joint demise and also in two several demises of the same lessors, this will be a fatal variance; as this is a description of how he was plaintiff, and not an allegation only.

INDICTMENT for a conspiracy to procure false witnesses on the trial of an ejectment at the Great Sessions for the county of Glamorgan.

The first eight counts of the indictment stated, that, "at Cardiff, in the county of Glamorgan, at the *General Sessions* of our Sovereign Lord the King then and there holden for the said county, before William Wingfield and Robert Matthew Casberd, Esquires, his Majesty's Justices of the Court of *Great Sessions*, a certain issue, before then duly joined in a certain action, to wit, an action of trespass and ejectment, brought, and then depending in the said Court of Great Sessions; in which said action *John Doe, on the demise of William Rees and David Terry, was the plaintiff, and Robert Thomas and Thomas Bevan were defendants*, came on to be tried," &c.: and charged the defendants with conspiring to pervert the course of justice, and produce false witnesses on that trial. The object of the conspiracy was variously laid in the different counts, and many overt acts were stated. The ninth count stated the trial of the ejectment to be in the Court of Great Sessions, but stated the demise in the same way in which it was stated in the other counts.

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Taunton, Campbell, Cross, and Maule, objected to the first eight counts, on the ground that calling the Court of Great Sessions the *General Sessions* was wrong—it should have been *Great Sessions*; for that the statute of 34 Hen. 8, c. 26, appoints Great Sessions to be held, and directs them to be called “the King’s *Great Sessions* in Wales:” and, in fact, they never are called General Sessions. As to the ninth count, they objected, that the issue was stated to have been joined in an action of ejectment in which John Doe, *on the demise* of William Rees and David Terry, was the plaintiff: now this purported to be a single joint demise, whereas, in fact, the issue was on a joint and two several demises of Rees and Terry. This, they contended, was a fatal variance.

Ludlow, Russel, and Ryan, contra. There is no uncertainty in the description of the Court; and though the Parliamentary title of the Court is not used, yet, from its being said to be held before William Wingfield and R. M. Casberd, Esquires, his Majesty’s Justices of his Court of Great Sessions, it can mean no other Court; and in the very act cited, this Court is called (in § 5) by the name of Sessions only. And as to the way in which the issue was alleged to have been joined, there was a case of a bill in Chancery being stated to be before the Right Hon. Lord Henley, and it was, when produced, a bill before Sir Robert Henley, Knt., and it was held no variance: and, in another case, an indictment for perjury stated a trial to have been before one Judge, and the record, when produced, stated (as usual in records of trials at assizes) that it was before the Judges, and it was held to be no variance: and in the recent case of *Rex v. Powell*, the indictment alleged, that there was a bill in Chancery against three persons, who were named, and it was, when produced, a bill against those three and a fourth, and it was held to be no variance. That was a stronger case than the present; as here a joint demise is alleged, which is true, though there

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PARK, J.—On the construction to be put on the stat. 4 Geo. 4, c. 34, I do not feel myself bound to give any opinion; and as to the other points:—It is in the first place clear, that where judicial officers have a power given them by the Crown, in their appointment, to delegate their powers, they may lawfully do so; as has been instanced in the cases of the Recorder of London, and the Judges of Wales, who have such a power given them; but the Judges of England cannot delegate their powers, because no such authority is given them by the patents, under which they hold their offices. Under this charter from the Crown, the defendant claims a right to act as a justice of the town of Denbigh, by virtue of his office of deputy alderman; and I am clearly of opinion, that, as he claims, by virtue of this office, so to act, he is entitled to notice of action, if his claim to this right is disputed; and I think, that, no notice having been given in this case, the plaintiff must be nonsuited.

Nonsuit.

C. Phillips, Godson, and J. Jervis, for the plaintiff.

Campbell, for the defendant.

[Attornies—*Jones and Williams & Evans.*]

COURT OF KING'S BENCH.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITLEDALE, JS.

In Bank.

Nov. 7th.

Godson moved to set aside the nonsuit in this case, on three points. 1st. That the defendant was not by the charter entitled to act as a Justice of the Peace, for that he was only deputy as Alderman; and that judicial author-

ity was not allowed to be delegated, unless by the express words of some act of Parliament or charter. *2nd.* That however a Justice might be entitled to notice of action, the defendant, being a deputy Justice, was not; and it would be observed that he did not act in his own name, the name of Copner Williams, his principal, appearing throughout the proceedings; and even the signature was "J. C. Williams, by *John Williams* (the defendant), *his deputy.*" And *3rd.* That even if he were a Justice, he had no authority over the plaintiff, as a domestic servant; and, therefore, as he was acting on a subject matter over which he had no jurisdiction, he was not entitled to notice of action.

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v.
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ABBOTT, C. J.—If he acted as a Justice, *bond fide*, he is entitled to notice of action, though he exceeded his authority.

Godson. If he had authority over the subject matter of the offence, he would be entitled to notice; but if it is a subject matter in which no justice at all can have a jurisdiction, I submit that he would not be entitled to such notice. And he cited *Prestidge v. Woodman*, 2 Dow. & Ry. 43.

BAYLEY, J.—If a Justice acts on a *bond fide* belief that he has authority over the subject matter, he is entitled to notice of action.

The Court granted a rule *nisi*, on the first and second points, and refused it on the third point.

In the case of *Molins v. Wetby*, 1 Lev. 76, it is stated, that the Recorder of London, the Recorder of Northampton, and the Steward of the Borough Court of Southwark, all appoint deputies to do their duties. The Judge of the Palace Court is also a deputy to

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 v.
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 & Others.

were other demises. And they cited *Mountstephen v. Brooke*, 1 B. & A. 224.

Taunton, in reply. The distinction is between matter of allegation and matter of description; the cases cited were cases of allegation, where it is sufficient to state what is true and can be proved, though something more is true also; but, in matters of description, the thing must be proved as it is described. And he cited *Green v. Bennett*, 1 Phil. L. Ev. 214. That a bill was filed against two or three persons is matter of allegation; but here they describe the way in which John Doe is plaintiff. If they had alleged John Doe to be plaintiff, that would have been proved by shewing him plaintiff on a demise; but if they undertake to describe how he is plaintiff, they must do it correctly.

PARK, J.—I am clearly of opinion that the first objection is fatal to the first eight counts. The act of Parliament gives this court a certain name. The description here is uncertain; for how can we know whether the indictment was found at a Court called the General Sessions or at the Great Sessions. As to the second objection: The question is, whether it is matter of allegation or of description. Nothing is more important than to describe correctly. Here they state that John Doe was plaintiff on a joint demise of two persons; they undertake to describe how he was plaintiff; this is, therefore, not matter of allegation but of description. The defendants must, therefore, be acquitted.

Verdict—Not Guilty.

Ludlow, Russel and Ryan, for the prosecution.

Taunton, Campbell, Cross, and Maule, for the defendants.

[Attornies—*Stokes and Deere & Cooke*.]

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BROMAGE and Another v. PROSSER.

August 20th.

ANDER of the plaintiffs in their business as bankers, the defendant saying, that he had just heard that Bromage Sneyd's bank, at Brecon, had stopped payment, and he must ride over to Brecon to try to get his money out of their notes that he held. It was laid as special damage, that he had injured the circulation of their notes. Plea—General issue.

The evidence on the part of the plaintiffs proved, that the defendant had spoken the words, and that just afterwards there was a considerable run on the plaintiffs' bank. For the defendant it appeared, that he was a holder of the notes of this bank, and that he really had been told the bank had stopped payment, and that he actually rode from his residence at Crickhowel to Brecon to get for the notes he held; but that, when he got to the bank, and was told that they had not stopped payment, and even had had a run on them, he said he would keep the notes, as they were as good to him as the money: and then appeared, that, on his return to Crickhowel, he showed the witness to whom he had spoken the words on which the action was brought, that the story of the Brecon bank having stopped payment was all false; for that he had been to Brecon, and found them going on with business the same as usual.

Campbell, for the plaintiffs, had objected to the evidence of these facts as inadmissible, as no justification of any kind had been put on the record.

ARK, J., was of opinion, that the evidence was admissible, to prove that the words were not maliciously spoken.

Semble, that malice is necessary to ground an action for words; and that if words be proved to be spoken *bona fide* and without malice, no action lies for the speaking of them, though they be false and actionable in themselves; and though injury result to the party from the speaking of them: and, *semble*, that the defendant may, under the general issue, go into evidence to shew that he spoke the words *bona fide* and without malice.

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Taunton, for the defendant, contended, that if the jury were satisfied that the defendant spoke the words *bond fide*, and without malice, he would be entitled to a verdict though the words might be untrue, and damage might ensue from the speaking of them; and that, to support the action, they must have been spoken maliciously.

Campbell, contra. All words spoken of another to the injury of his reputation, being untrue, must be taken to be maliciously spoken; and are actionable, unless the communication be of a privileged nature, as made to a man's attorney, or counsel, or the like.

PARK, J.—To support an action for words, malice is essential; but malice may be presumed by the jury, either from their being false, from the nature of the words themselves, from the manner of the speaking of them, or from other evidence; but then the absence of malice may be shewn on the other side: and if it were not competent to the jury to consider of the question of malice or no malice, and for the defendant to shew that he was not actuated by any malice, the communications of society must be at an end. I shall leave the facts to the jury, and leave it to them to say, whether, after what has been proved on the part of the defendant, they are not satisfied that the defendant spoke the words *bond fide*, and without malice; for malice, express or implied, being one of the ingredients of the action, the defendant may have the advantage of this defence on the general issue.

Verdict for the defendant.

Campbell, for the plaintiff.

Taunton and *Maule*, for the defendant.

[Attornies—*Bold & V.* and *Powell & Co.*]

COURT OF KING'S BENCH.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITLEDALE, JS.

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Campbell moved for a rule *nisi*, for a new trial, on two grounds. 1st. Because the evidence of the defendant having previously heard statements from others, similar to those he made, ought not to have been received. And 2nd. For misdirection of the learned Judge. And he contended, that, if actionable words were spoken without there being any reason to induce the speaking of them, and without the communication being of a privileged nature, that the party injured would be entitled to a compensation, though no actual malice appeared in the defendant.

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The Court granted a rule *nisi*.

MONMOUTH ASSIZES.

TRIPP, Gent. one, &c., v. THOMAS.

August 21st.

ACTION for words spoken of the plaintiff as an attorney, imputing to him that he had caused false witnesses to be produced on the trial of a cause.

The defendant had suffered judgment to go by default; and when the jury were impanelled before the Under-Sheriff, under a writ of inquiry, the plaintiff's Counsel addressed the jury, but did not call any witnesses, nor ad-

Words.—If the defendant, in an action for words spoken of an attorney, let judgment go by default; and on the execution of the writ of inquiry, neither plaintiff

nor defendant goes into any evidence of any kind, the jury are entitled to give such moderate damages as they think ought to be paid for the speaking of an attorney the words laid in the declaration.

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 one, &c.
 v.
 THOMAS.

duce any evidence of any kind. The defendant's Counsel also addressed the jury, but called no witnesses. The Under-Sheriff read the whole of the declaration to the jury, and told them to give such damages as they thought right for the injury done to the plaintiff by the speaking of these words.

The jury found a verdict for plaintiff—Damages, 40*l*.

COURT OF KING'S BENCH.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITTLEDALE, JJ.

In Bank.

Nov. 9th.

Ludlow now moved to set aside the inquisition, on the ground, that, as no evidence had been adduced before the jury, they were only justified in giving nominal damages, the judgment by default admitting some damages to be due, but admitting no certain amount above a farthing.

ABBOTT, C. J.—The judgment by default admits the speaking of the words as laid in the declaration, and that the plaintiff was an attorney is also alleged; and the jury had a right to give damages for such speaking, without any further evidence than the defendant admitting the fact by letting the judgment go by default. The jury do not appear to have given vindictive damages; and I think we should do wrong to disturb their verdict.

The other Judges concurred.

Rule refused.

GLOUCESTER ASSIZES.

(*Crown Side.*)

BEFORE MR. JUSTICE LITTLEDALE.

REX v. JAMES GARDNER.

August 28th.

INDICTMENT for robbery.

The prosecutor proved that the prisoner obtained his money by threatening to accuse him of an unnatural crime.

The prisoner's defence was, that the prosecutor had made an attempt to commit such a crime, and had voluntarily given him the money not to prosecute him for it.

LITTLEDALE, J., ruled, that it was equally a robbery to obtain a man's money by intimidating him with a threat of an accusation of an infamous crime, whether the prosecutor were really guilty of the crime or not; as, if he was guilty, the prisoner ought to have prosecuted him for it, and not have extorted money from him: but, if the money was given voluntarily, and without any previous threat, the indictment could not be supported.

It is equally a robbery to extort money from a person by threatening to accuse him of an unnatural crime, whether the party so threatened has been guilty of such crime or not.

Verdict—Not Guilty.

Twiss, for the prosecution.

Justice, for the prisoner.

[Attornies—*Newman* and ———.]

ADDENDA.

COURT OF KING'S BENCH.

*(Michaelmas Term, 1824.)*BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITTLEDALE, J.
In Bank.1824.
Nov. 16th.

LANG v. ANDERDON.

SEE *ante*, p. 171. The rule *nisi* for a new trial now came on to be argued.

The *Attorney-General*, Gurney, and Kaye, shewed cause. The question is, was the sailing in this case a sailing from Demerara within the policy? If it had been warranted to sail only, there could have been no question, and the word "from" can make no real difference. It has been settled, that a warranty *to sail* is complied with by the vessel *bond fide* breaking ground, though she does not clear the port. This was a small vessel, and took in her whole cargo at the town; and got away from the town and port, and had got two miles and a half on her voyage, even out of the river, when the pilot thought that she could not get over some shoals about ten miles further on. Now the objection is, that she had not at that time complied with the warranty to sail *from* Demerara, because she had not passed these shoals, on the *outside* of which large vessels take in their cargoes; and this being a warranty to sail *from* Demerara, it is not fulfilled unless the ship has passed these shoals, which are contended to be at Demerara. Lord Chief Justice GIBBS, in his judgment in the case of *Moir v. The Royal Exchange Assurance Company*, 6 Taunt. 241, lays down, that where

there is a warranty "to sail" on or before such a day, when the ship breaks ground, and gets under weigh, the warranty is complied with. There, the ship had not got out of the port; but this ship had left the town and the river, and had got into open sea; and the only reason for her not proceeding, was, the danger arising from shoals ten miles further on the voyage. The argument on the other side is, that as large ships do not pass the shoals, the port of Demerara extends to them. If a vessel had gone outward-bound from London to Demerara, and had moored twenty-four hours outside them, and had even taken out some part of her cargo there, could it be contended that this was a completion of the voyage? and that would be the converse of the present case. There is no evidence that, outside the shoals, any port dues are payable. The question, whether the vessel had left Demerara, was a question for the jury, and that question they have decided.

Scarlett, Campbell, and F. Pollock, contra. This ship was to sail from Demerara; and a great deal has been said about the town and the river. Now the name of the town is George-town, and Demerara is the province. Now it is contended, that the port did not extend to the place where this ship was, because it was beyond the mouth of the river; but if that were so, no large ship ever comes within the port. The case of an outward-bound ship has been put, but that is not at all analogous; because, if a ship discharges at two or more ports, the last port is the port of discharge.—Suppose the policy it and from Jamaica warranted to sail on or before July 15; if the ship had, *bond fide*, commenced her voyage, it would be a compliance with the warranty; but if it was a warranty to sail from Jamaica, this clearly would not be complied with by her sailing from port to port in that island before the day: and in a great many places, vessels

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of any burden can never get within three miles of the shore. When the words are "*to sail from*," they must be taken to mean a leaving of all places where ships ever load; and, in fact, the place where this ship came to anchor was as much a part of Demerara as any other place in or out of the river. It may be said, that where the ship received her cargo was the place meant as Demerara in the policy; but then the policy is "on ship or ships:" and if the party had two ships, one of one hundred tons, and the other of four hundred tons, the one would take in her cargo in the river, and the other would take in her's on the outside of the shoals; and if the small one sailed to a place, a mile short of the place where the large one lay, the former would have *sailed from* Demerara, and the latter would be still *at* Demerara. The best course for commerce is, to have instruments expounded by certain general rules of construction, and not to let the construction in each particular case go on the particular facts of that case. And they cited *Moir v. The Royal Exchange Assurance Company*; and contended, that the words "*to sail from*" a place, were equivalent to the words "*to depart*," which were used in the policy in that case. The question is, What is Demerara? Now it is clear, that the places to which all ships, both large and small, go, constitute but one port of Demerara; and the very reason of the warranty is, that the ship shall have passed certain dangerous places, before a particular time of the year. But if the warranty is complied with in this case, the ship might have stayed at the place where she cast anchor for an indefinite time, and yet have the full benefit of the policy.

ABBOTT, C. J.—The Court will take time to consider of this case before they deliver their judgment.

It has been long settled, that if a ship breaks ground, *bonâ fide*, to proceed on her voyage, with her cargo and clearances on board, it is a compliance with a warranty *to sail* on or before a particular

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ke. *Bond v. Nutt*, Cowp.
Phelluson v. Ferguson,
361; *Wright v. Shiffner*,
315. But in the case of
v. Newnham, 3 M. & S.
eight and goods were in-
at and from Portneuf to
warranted to sail on or
October 28." The ship
led at Portneuf, which is
iles up the river St. Law-
nd on the 26th of October
down the river to Qué-

bec, with an incomplete crew;
and at Quebec completed the
crew, and obtained a clearance,
and sailed from Quebec on the
30th. Held, that the dropping
down from Portneuf did not sa-
tisfy the warranty to sail; for that,
to sail, means to sail on her voyage,
that is, with her clearances, and
equipt for the voyage.

But, in *Moir v. The Royal Ex-
change Assurance Company*, the
Court held, that a ship breaking
ground to proceed on her voyage,
but not getting out of port, is not
a compliance with a warranty
"to depart" on or before a parti-
cular day."

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v.
ANDERSON.

GARRETT v. HANDLEY.

Nov. 16th.

ante, p. 217. The rule *nisi* for a new trial coming
is argued, the Court called on the plaintiff's Coun-
support the rule.

Attorney-General and Campbell. This rule was
for on two grounds. 1st. Because it appeared at
al that the plaintiff was a partner in the bank of
s. Bodenham and Co., at Hereford, and that the mo-
as advanced by that firm to Gibbons; and though it
dvanced by them at the instance of the plaintiff,
Gibbons and not the plaintiff was debited in their
they, and not the plaintiff, should have brought
tion. Now, as the money was advanced by Boden-
nd Co., at the instance of the plaintiff, he was, in
of law, debtor to them, and therefore the defendant

If a plaintiff has
been applied to
to lend money
to A., and the
plaintiff re-
quests a firm, of
which he is a
member, to do
so, and they ad-
vance the mo-
ney, debiting A.
in their books:
the plaintiff can-
not maintain
an action a-
gainst a third
person, who has
guarantied the
re-payment of
the money to be
advanced to A.
by the plaintiff.

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is liable to him for the amount: and it has been held, that if a written agreement is made with one person only, for the benefit of more, that person may bring an action on it. As to the 2nd point: That it was incumbent on the plaintiff to prove that the defendant had not made provision for the re-payment of the money.—The *onus* certainly must lie on the defendant, to shew what provision he had made, as the plaintiff could know nothing on the subject; and, after the lapse of so much time (the guaranty having been given in the year 1818), the question, whether the defendant had made provision, should have gone to the jury.

BAYLEY, J.—You might have gone to the defendant, and have asked him what provision he had made.

Jervis and Tindal, contra, were stopped by the Court.

ABBOTT, C. J.—My learned Brothers think, that, on the first point, the nonsuit was clearly right. The letter of the defendant is to the plaintiff alone, and takes no notice of his partners: and if the plaintiff had borrowed the money of his partners, and then advanced it to Gibbons, this action would have been rightly brought; but Gibbons is made debtor to the firm for this money, and the plaintiff is not. The Court must therefore discharge the rule.

BAYLEY, J.—It was an essential part of the allegation of this declaration that the plaintiff advanced the money, whereas the proof is that the firm did so.

HOLROYD and LITTLEDALE, Js., concurred.

Rule discharged.

In an action on a contract, if there be any party who ought to have joined in the action who has not, it is a ground of nonsuit; but in actions

delicto, the omission of who should have joined as, is no ground of nonsuit. If a person is held out to be a partner in a trade, and in an action on a contract the firm, unless, at the instant evidence is given of no interest in the matter, then, the action will be maintainable, though he is not the bringing of it. *Teedley*, 14 East, 210. This is important; as it frequently happens that the person so held out is a most material partner in the firm he is thus connected with. In the case of *Archbuckle*, 2 Taunt. 524, it was held, that it was no ground that a dormant partner, who had a share of the profit of the contract, but was not privy to the bringing of it, had not joined in

bringing the action. And in the case of *Mawman v. Gillett*, 2 Taunt. 325 (n), where the plaintiff had entered into a contract with the defendant, and had, *afterwards*, let other persons have shares of the benefit of the contract; it was held, that the persons who had these shares could not have joined in the action for breach of the contract; and that, therefore, one of them was a competent witness to prove the original contract between the plaintiff and the defendant. And in *Lucas and Others v. De La Cour*, 1 M. & S. 249, where one of several partners made a contract, and at the time declared the subject matter to be the property of himself alone; it was held, that this declaration was evidence against all the partners, and that they could not sue on the contract.

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GARRETT
v.
HANDLEY.

Lucas and Others, Assignees of SWEET, v. CHADLEY.

Nov. 16th.

ante, p. 174. The rule *nisi* for entering a verdict for the defendant now came on to be argued.

Myatt shewed cause. I submit that the Lord Chief Justice's direction was perfectly right. The question is, whether, by this arrangement, the debt due from the defendant, James Chadley was put an end to. I contend, that to extinguish the debt, Sweet should have given a written discharge to the defendant, and for that discharge there should have been some consideration: but no receipt of any kind was given. As there was no

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writing, what is to compel Robert Chadley to answer for the debt of his brother? for that is the effect of this arrangement. Without some undertaking in writing he certainly would not be bound. This case is not so strong as the case of *Wyatt v. The Marquis of Hertford*, 3 East, 147 (a); as, there, the plaintiff had a written security from the steward, and therefore had a remedy against him: but Sweet could never have any right of action against Robert Chadley, as there was no writing; and as this was a paying by him of the debt of another.

BAYLEY, J.—There you are quite wrong, Mr. *Marryatt*; for there are many cases which decide, that a man, by word only, may take a debt upon himself, discharging the principal debtor. In this case, Robert owes James money; and, by this arrangement, Robert is to pay Sweet what he would otherwise pay to his brother.

Marryatt. There was no evidence at the trial that Sweet knew that one of the brothers owed the other money: all that came to his knowledge was, that Robert Chadley desired him to place James's account to his, and that he consented to do so.

Gurney, contra. The case stands thus: Robert Chad-

(a) In that case, the plaintiff had done certain work for the defendant: the Marquis's steward had given him his own draft in payment, and the plaintiff gave a receipt for it as money. The draft was dishonoured, and the steward gave the plaintiff another draft, which was also dishonoured. This action was therefore brought against the Marquis; on whose part it was contended, that the

plaintiff, by taking two of the steward's drafts successively, had accepted his security for the money, and, therefore, could not charge the defendant. But the Court held the defendant still liable for the work done, unless he could shew "that he was in any way prejudiced by the steward's having given his own security to the plaintiff, and taken the latter's receipt."

ley owes money to James; and the two agree with Sweet, that Robert should pay a sum to Sweet in discharge of James; and, in pursuance of this, Robert is debited to the amount in Sweet's books. Under this arrangement, the parties went on till after the bankruptcy of two of them; I therefore submit that this was a perfectly legal bargain, and, therefore, that the assignees of Sweet cannot now recover against this defendant.

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CUXON
& Others,
Assignees of
SWEET,
v.
CHADLEY.

ABBOTT, C. J.—We shall consider of this case before we give our judgment.

GILL v. CUBITTS.

Nov. 16th.

SEE *ante*, p. 163. The rule *nisi* for a new trial in this case came on to be argued.

Scarlett and *Parke* shewed cause, and contended, that a party suing on a bill of exchange, which had been stolen, ought to shew that he had obtained the bill under circumstances clear of all suspicion; and it was not at all a new principle, that, if a party received a stolen bill of exchange under circumstances that were calculated to excite his suspicion, he could not maintain an action on such bill: for, in a case a few years since at Lancaster, tried before Mr. Justice HOLROYD, in which the party sued on a bill of exchange that had been lost, that learned Judge left it to the jury to say, whether the party had used due caution in taking it, and the jury were of opinion that he had not. Here, the plaintiff's clerk did not take the numbers of the notes which he gave for it; and he said, that he at all times discounted bills, having any respectable acceptance, without making any inquiry as to the person

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that brought them. The rule is, that every person suing on a stolen note or bill is bound to shew that he gave value for it in a fair way; and if the rule were otherwise, any person who had discounted a stolen bill might recover on it, though he had previously held out every temptation to persons to bring stolen bills to him for him to discount them.

Gurney, and *F. Pollock*, *contra*, after citing the case of *Lawson v. Weston*, 4 Esp. 56, contended, that if there was a difference between that case and the present, it was in favour of the plaintiff; because the plaintiff's clerk not only acted *bond fide*, but thought that he knew the features of the person who brought the bill to be discounted. The proper question to be considered is—Did the party act *bond fide* in taking the bill? If we were to consider it on the question of carelessness, it would be against the defendant, for he might have saved the whole loss by indorsing the bill specially; and his sending a bill by a coach, with a general indorsement on it, was a greater want of care, than a person afterwards discounting the bill in the way of his business. His Lordship spoke of a board being posted up, inviting suspicious persons; which was putting the case very strongly: for, instead of that, the case was that of a respectable clerk, acting *bond fide*, being once deceived by discounting a bill, brought by a man whose person he thought he knew before. In the case tried at Lancaster, the party had not acted *bond fide*; but where a person has acted *bond fide*, and given a full consideration for a bill, no case has yet decided, that mere want of caution on his part is a bar to his recovering. It is of the greatest importance, that, in a great commercial country, the circulation of bills should be most free. The Court can know little of the manner in which mercantile business is transacted. Bill-brokers continually discount for persons they do not know, provided they consider the names on the bill suf-

ficient to secure its payment at maturity : and if it were permitted to be a defence, that the party had not used sufficient caution when he took a bill, it would completely paralyze the circulation of negotiable securities.

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ABBOTT, C. J.—If, upon a re-consideration of this case, I could think that the jury could have come to a different conclusion, I should be most anxious for the case to go down to another jury; but I think that the jury could not come to any other conclusion. There is, certainly, a great difference between this case and the cited case, though I think that if Lord KENYON could have anticipated the consequences of his ruling, he would not have decided as he did. The practice of robbing stage-coaches of securities for money has been most frequent; and, personally, I cannot help thinking that this practice has been much increased by the facility with which the stolen securities are disposed of. I should be grieved if commerce could be injured by the decision this Court has to pronounce; but I think that the true interests of commerce will be assisted by persons using due caution: and the sooner it is known that the authority of the case of *Lawson v. Weston* is at least doubted by this Court the better. I certainly wish that its authority had been doubted sooner; and I must say, that the practice of this bill-broker's office is highly inconvenient, as it goes directly to encourage robbery and fraud.

BAYLEY, J.—I agree with Mr. *Gurney* that the Lord Chief Justice, observing on the effect of a board being posted up, having the words—"bills, having respectable names on them, brought by persons whose features are known, discounted here, without any inquiry as to the bringer," was putting the case strongly; but the practice of the plaintiff's office completely warranted it: for the plaintiff's clerk knew nothing of the bringer, does not ask him a single question as to who he was, or how he came

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by the bill; and his Lordship, most properly, in my opinion, left it to the jury to say, whether due caution had been used in the taking of the bill. It has been argued, that the question should have been, Was the bill taken *bond fide*, and for value? but I consider it a part of *bona fides* to ask all proper questions. On referring to the cases, it will be found, that this point was, in substance, left to the jury.—In the case of *Miller v. Race* (1 Burr. 452), Lord MANSFIELD lays a stress on the circumstance of the stolen note having been taken “for a full and valuable consideration, in the usual course of business;” and in the case of *Grant v. Vaughan*, (3 Burr. 1516), Mr. Justice WILMOT observes on the plaintiff there having taken the note fairly and *bond fide*, in the course of trade, and *with caution*: so that, in that case, his Lordship uses the very term “caution.” And in the case of *Peacock v. Rhodes*, (Doug. 632), Lord MANSFIELD lays down, that the question of *mala fides* was a question for the jury; and he mentions different grounds of suspicion as fit matters for their consideration. It is important for the interests of trade that it should be known, that, if a man takes a bill of a person, whose name he does not know, and whom he does not know where to find, without asking any questions, he is not acting with such sufficient caution as to entitle him to maintain an action on the bill, in case it had been stolen.

HOLROYD, J.—If the party took this bill under circumstances of suspicion, merely because there is the name of a good acceptor on it, I think he is not entitled to recover. I certainly cannot agree with the doctrine laid down in the case of *Lawson v. Weston*. I also think that the jury are the proper tribunal to consider whether the party acted with fair caution or not; and I think that in this case they have come to a proper conclusion.

Rule discharged.

GRAY and Another v. Cox and Others.

Nov. 19th.

SEE *ante*, p. 194. The rule nisi for a new trial in this case came on to be argued.

Scarlett shewed cause. If a person sells goods for a particular purpose, at a known price, the Law raises an implied warranty that the goods shall be reasonably fit for that purpose; and, in fact, the copper sold by the defendants to the plaintiffs was wholly unfit for sheathing. Mr. Gurney argued that his clients were only merchants, and sold what they bought; but I contend, that if they sold an article as sheathing copper, which was not so, they must be liable in damages: for every party selling goods by a particular description, impliedly warrants them to be of that description. If a man buys as a coach horse a horse that is not so, and sells it again as a coach horse, would it be any defence to him to say, I bought it as a coach horse; and, because I so bought it, you have no remedy against me? And he cited the cases of *Laing v. Fidgeon*, 6 Taunt. 108; and *Gardner v. Gray*, 4 Camp. 144.

J. L. Adolphus, on the same side, was stopped by the Court, who called on

Gurney, in support of the rule: who cited *Stuart v. Wilkins*, Doug. 18; and *Parkinson v. Lee*, 2 East, 814; and argued, that every sheet of the copper was stamped with the words, "The Mines Royal Copper Company," which told every buyer from what place the copper came; and if the plaintiffs wished to have a security that the copper should last a certain number of voyages, they might have had an express warranty for that purpose. It appeared that the copper in question was a part of a much larger

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quantity, and that there had been no complaint of any part of the residue of it.

Campbell, on the same side. The declaration avers, that the copper should be of a sound, merchantable, and serviceable quality. Now, how is this supported? The copper in question was at no time described as possessing these qualities, and there was no express warranty of any kind. Therefore, the warranty (if any) was implied. The defendants have a warehouse at which they sell their goods; the plaintiffs come there, and order goods, having an opportunity to inspect them; and, no fraud being alleged, the question is, whether the vendors gave an implied warranty against latent defects? The rule has always been *caveat emptor*. Mr. *Scarlett* has relied on the case of *Laing v. Fidgeon*; but that case is distinguishable from the present; as in that case there was no opportunity of inspecting the goods: and in no case has it ever been decided, that a defendant was liable, where there had been an opportunity of inspecting the goods.

BAYLEY, J.—In the present case there was a fixed price; and I would ask what opportunity the plaintiffs had of inspecting the goods?

Campbell. The shipwright who put on the copper was the agent of the plaintiffs; and he made no objection.

ABBOTT, C. J.—But, at the trial, the shipwright stated that it was no part of his business to examine the copper.

Campbell. This being a latent defect, of which both parties were equally ignorant, the purchasers should have guarded themselves by an express warranty that the copper was good for a particular purpose; and there is

plied warranty against latent defects, where there is no express warranty.

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PLEDALE, J.—In the case of *Chandeler v. Lopus*, 10 Mod. 4, the Court held, that where a jeweller sold a diamond which he affirmed to be a bezars stone, which, in fact, was not so, yet no action could be maintained against him, because he did not warrant it to be a bezars stone. That case goes much too far.

WILKINS. In the case of *Bridge v. Wain*, 1 Stark. 109, Lord ELLENBOROUGH says, that to satisfy an allegation that the goods were warranted to be of any particular quality, proof must be given of such warranty.

BOTT, C. J.—My opinion at the trial was, that the defendants having sold this as “sheathing copper,” they were taken impliedly to warrant it fit for that purpose. Whether the declaration on this case is supported by evidence, requires further consideration. We therefore think it better that this case should be argued again by a gentleman on each side; and that that point, as in my direction, may be considered, as at the trial I have a narrower view of the case than now.

Inst. 102 a, Lord COKE says, Note, that by the civil law a merchant is bound to warrant the goods that he selleth or conveyeth, though there be no express warranty, but the common law binds him not, unless there be a warranty either in deed or in law, *sed emptor.*”

In the case of *Hern v. Nichols*, 1 Mod. 289, was an action on the declaration against the defendant, a merchant, for selling to the plaintiff a quantity of silk of a particular sort, as it was silk not of that sort. It was found that there was no deceit in the de-

fendant, but in his factor abroad; and the Court held the merchant civilly responsible for the deceit of his factor. The case of *Stuart v. Wilkins*, Dougl. 18, merely decides, that for the breach of an express warranty, the plaintiff may declare in *assumpsit*. The case of *Parkinson v. Lee*, 2 East, 314, decides, that if a person buys a commodity (in that case hops), the law does not raise an implied warranty that the commodity should be of merchantable quality, though the full merchantable price was given; and, therefore,

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if by the fraud of the grower of the hops there was a latent defect in them, by which, unknown to the defendant, they were rendered unmerchantable, no action was maintainable against the defendant: and GROSE, J., said, "The mode of dealing is, that the plaintiff buys hops from the defendant, whom he knows is not the grower. If he doubts the goodness, or does not chuse to incur any risk of a latent defect, he may refuse to purchase without a warranty. If an express warranty be given, the seller will be liable for any latent defect, according to the old law concerning warranties."

In the case of *Laing v. Fidgeon*, 6 Taunt. 108, where the defendant was to supply a quantity of saddles, the Court held, that, on every contract for the supply of manufactured goods, there is an implied term that the goods shall be of merchantable quality. It however appeared that the goods delivered did not correspond with the sample; but that circumstance was not observed on by the Court in giving judgment.

In *Gardner v. Gray*, 4 Camp. 144, the plaintiff had bought 12 bags of "waste silk;" and when they were delivered, they were of so inferior a quality as not to be saleable as waste silk: and Lord ELLENBOROUGH held, that the purchaser had a right to expect a saleable article, answering the description in the contract; and that, without any particular warranty, it is an implied term in every such contract. "Where there is no opportunity of inspecting the commodity, the rule of caveat emptor does not apply. He

cannot, without a warranty, insist that it shall be of any particular quality or fineness; but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract."

In *Bridge v. Wain*, 1 Stark. 504, Lord ELLENBOROUGH ruled, that if goods were sold by the name of "scarlet cuttings," and so described in the invoice, an undertaking that they were so must be inferred; but to satisfy an allegation that they were warranted to be of any particular quality, proof must be given of such a warranty: however, "a warranty is implied that they were that for which they were sold."

In addition to these cases, there is the case of *Shepherd v. Kain*, 5 B. & A. 240. There, a ship had been sold, which was described in the advertisement for the sale "as a copper-fastened vessel," but the advertisement also stated, "the vessel, with her stores, as she now lies, to be taken with all faults, without allowance for any defects whatsoever." The ship was not, in fact, a copper-fastened vessel; and it appeared that the plaintiff, before he bought her, had a full opportunity to examine her situation. But the Court held, that the action well lay, and that the meaning of the advertisement must be, that the seller would not be responsible for any faults a copper-fastened ship might have; and that the terms "with all faults" must mean with all faults which it may have consistently with being the thing described.

WALMISLEY v. ABBOT.

SEE *ante*, p. 309. This case came on to be argued before the Judges (who sat in pursuance of the King's warrant for that purpose) after Trinity Term.

Whately shewed cause. By the statute 55 Geo. 3, c. 194, § 9, it is enacted, that the Court of Examiners of the Apothecaries' Company, or the major part of them, shall examine all persons desirous of practising as apothecaries, and grant them certificates of their having duly passed such examination. Section 14 of the same statute enacts, that, after the 1st day of August, 1815, no person who was not in practice before, shall practise as an apothecary, unless he has passed his examination, and has received his certificate: and § 21 enacts, "That no apothecary shall be allowed to recover any charges claimed by him in any Court of Law, unless such apothecary *shall prove on the trial* that he was in practice as an apothecary prior to, or on the said 1st day of August, 1815; or, that he has obtained his certificate, to practise as an apothecary, from the said Master, Wardens, and Society of Apothecaries, as aforesaid." No part of the act requires the certificate to be signed by the Court of Examiners; they are to grant the certificate: and if reasonable evidence is adduced that the certificate was granted by them, it would be sufficient. The certificate would have been good if they had not signed it; and it would be very hard to cast on the plaintiff the *onus* of proving the handwriting of several persons whose names were unnecessarily signed to the certificate. If the certificate were not genuine, the party must be guilty of a gross fraud, which the Court will not presume. And this case is distinguishable from the case of *Moises v. Thornton*, 8 T. R.

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303 (a). There the plaintiff could not prove the seal of the University of St. Andrew's, and could not prove that the diploma granted to the plaintiff was genuine.

Taunton, in support of the rule. The certificate, to be good and valid, must be granted by a majority of the Court of Examiners: and, to shew this, the plaintiff must prove that the names attached to it were the genuine signatures of the major part of the Court of Examiners, which he has not done. The case of *Moises v. Thornton*, was stronger than the present; as there a witness proved that he had seen the proper officers sign a certificate that such a diploma had been granted, and yet that was held to be not sufficient.

BAYLEY, J.—That certificate was not the diploma, and the diploma itself was not sufficiently authenticated.

Taunton. No more is this certificate, my Lord.

[ABBOTT, C. J., was absent.]

(a) The case of *Moises v. Thornton*, 8 T. R. 303, was an action for words, the defendant having called the plaintiff a quack; and in the declaration it was averred, that the plaintiff was a physician, and had duly taken the degree of a Doctor of Physic. To prove this, a diploma, purporting to be granted by the University of St. Andrew's, in Scotland, was produced; and a witness proved, that he went into Scotland, and was told at that University, by the Rector and Professors, whom he attended at the public library, where they were assembled in their official capacities, that the

diploma was granted by that University, and that the seal to it was the seal of the University; and the witness also saw the Professors sign a certificate (which they gave him, and which was produced at the trial), which stated, that the University had granted such a diploma to the plaintiff. Lord KENYON, at the trial, held, that this was not sufficient to authenticate the diploma; and the Court above confirmed that decision, and observed, that the plaintiff ought to have given some evidence that the seal affixed to the diploma was the seal of the University of St. Andrew's.

BAYLEY, J., (after alluding to the terms of the act of Parliament)—I am of opinion, that, putting a fair and reasonable construction on the clauses of this act of Parliament, it was not incumbent on the plaintiff to prove the handwriting of all the signatures to the certificate, but only to shew that it was the genuine certificate of the Court of Examiners, and issued by them; and of those facts I think sufficient evidence was given at the trial.

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HOLROYD and LITLEDALE, Js., concurred.

Rule discharged.

For the report of the argument in this case I am indebted to the kindness of a friend; as, at the time this case was under the consideration of the Court, I was attending at the Old Bailey, to conduct the prosecution in the case of Captain M'Donagh.

VICE-CHANCELLOR'S COURT.

BEFORE SIR JOHN LEACH, KNT., V. C.

JONES and Others v. CARRINGTON, Clerk.

Nor. 26th.

SEE *ante*, p. 327. The motion for a new trial in this case came on to be argued.

On the trial of a *modus*, the receipts of a lessee of a deceased vicar are evidence; and if a witness proves that her father and brother have their receipts,

Sugden, *Curwood*, and *Russel*, in support of the motion, made four points. 1st. That the receipts of the lessee of

that were tenants of the tithes for above forty years, that is sufficient to let without proving a lease to them.

If a *modus* is laid, in an issue directed out of the Court of Chancery, to extend over the tithes of a parish, and the jury so find, the Court of Equity will not send the case down to a new trial, because it appeared at the former trial that a hamlet, in the tithes of which neither plaintiff nor defendant claimed any interest, was a part of that parish, and was not covered by the *modus*.

If, at the trial, an interested witness, who produced old documents, was allowed to give evidence of the place from which he brought them, thereby tending to establish their authenticity, though he ought not to have been permitted to give such evidence, yet a Court of Equity will not send the case to a new trial, if there was evidence enough to support the verdict, exclusive of the documents he produced.

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a former vicar were not evidence on an issue to try the validity of a *modus*; and that, if they were evidence in this case, there was no proof that the persons by whom they were signed were lessees. *2nd.* That the *modus* was laid to be over the whole parish of Berkeley, whereas it was clearly made out at the trial, that a tithing or hamlet, now called improperly the parish of Hill or Hulle, was a part of the parish of Berkeley, within the time of legal memory; and that the alleged *modus* never applied to that tithing or hamlet. *3rd.* That a witness who was interested, and therefore incompetent, was permitted to give evidence of the custody of certain documents produced in evidence. *4th.* That, at the trial, undue weight was attached to the terrier dated 11th December, 1800.—(This last point, however, involved no question of law).—On the *first* point, they argued, that the books of a receiver were evidence, because his principal is presumed to overlook and examine them, and therefore to be aware of, and assenting to his acts; but, with a lessee, all the principal can do is to receive the rent as it becomes due, and over the acts of the lessee he can have no control: and, if it were otherwise, a person having only a term of years might bind the inheritance; and even if the receipts of lessees were evidence, they must be proved to be so; and tithes lying in grant and not in livery, no interest in them could pass, except by way of retainer, without deed, or, at least, without some instrument in writing. Now, in this case, there was no evidence of any lease.

[The VICE-CHANCELLOR.—If these persons received the tithes for forty years, is it not to be presumed that they did so by some legal title?]

There was no evidence of any actual payment to them, except their receipts.

[The VICE-CHANCELLOR.—Suppose the witness to have stated, “my father and brother held these tithes for forty years,” without saying at all in what capacity, would not that be evidence that they held them rightfully?]

witness who stated that did not prove a single pay-

And they cited *Short v. Lee*, 2 Jac. & Walk. 464 ; *Manby v. Curtis*, 1 Price, 225 (a). On the second that the hamlet of Hill was a part of the parish of ay : They argued that this was proved at the trial ; at a place once a part of a parish could not be second made a distinct parish, without an act of Parliament, which there was not in this case. And they cited *v. Pawle*, Cro. Car. 92.

VICE-CHANCELLOR.—This applies only to the the issue, as the *moduses* are laid to be over the parish.]

then went into the evidence on this point. On d point—that an interested witness was allowed evidence of the custody of old documents.

VICE-CHANCELLOR.—The Court will not send e to be tried by another jury, if there was sufficient e to support their finding without this witness and ments he put in (b).]

they argued, was most important as a point of

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the case of *Short v. Lee*, Walk. 464, the Master of held, that a book in the ing of R. B., purporting an account of tithes col- him seventy years ago, admissible in evidence, t an alleged *modus*, with- f that R. B. was at that actor of the tithes; for, the cases have gone a 7 in favor of rectors, in he books and papers of decessors evidence for t, in all these cases, the g is to prove the charac- e individual who wrote you fail in this, they can- evidence." And in the

case of *Manby v. Curtis*, 1 Price, 225, the Court of Exchequer (Wood, B. *dissentiente*) held, that a receipt more than fifty years old, for a sum of money, purporting to have been received in lieu of tithes, was not admissible in evidence on the trial of a *modus*, unless evidence was also given of what character the person stood in who gave the receipt.

(b) A verdict in an action is to bind the right of the parties, but a verdict on an issue is merely to inform the conscience of the Judge in Equity: therefore the rules relative to the granting of new trials are not exactly the same in the Courts of Law and Equity.

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law. The custody of such documents is what gives them their authenticity, and is therefore most material; and it also goes to connect the papers so produced with the case in issue; and it often happens that the good custody of ancient documents is the only ground on which they are admissible in evidence. Any person whatever may hand in documents; but, if he be interested, he ought not to be allowed to say one word respecting them.

The VICE-CHANCELLOR.—The only question on which I wish to hear the Counsel against the motion, is the point, whether the finding of the jury can be supported in its present form; the hamlet of Hill being proved to be a part of the parish of Berkeley, and the *moduses* being proved not to extend to that. I entertain no doubt on the third point, with respect to the interested witness: but suppose that the evidence of that witness, and the papers he authenticated, were excluded, on the remainder of the evidence the verdict must have been the same. But, on the second point, I think, that, if Hill is a part of Berkeley, the verdict is not supported by the evidence.

Heald, Taunton, Koe, and Twiss, against the motion, argued, that, as Hill was now called a parish, and had a church and an incumbent of its own, it might be presumed that it was not the same place mentioned as a hamlet of the parish of Berkeley; and the issue was directed to try *moduses* in that part of the parish of Berkeley, of which the defendant was endowed of the tithes, he having no interest whatever in the tithes of Hill, whether it were part of Berkeley or not; and, supposing this hamlet (if it be the same place) to be proved to be within the parish of Berkeley, the issue may be confined to that part of the parish which is covered by the *moduses*; and therefore, at most, it is a mere slip in the wording of the issues.

Curwood, in reply. If this verdict were allowed to stand, it being fully proved that Hill is a part of the parish of Berkeley, on any bill filed by the incumbent of Hill, to recover this species of tithe, this verdict, to which he was no party, and which he never had any opportunity of contesting, would be evidence against him; as the jury find by their verdict, that, from time whereof the memory of man runneth not to the contrary, these *moduses* existed over the *whole* of the parish of Berkeley.

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The VICE-CHANCELLOR.—The issues lay the *moduses* as extending over the whole of this parish; and though they are sufficiently established over the great bulk of it, yet over a part of this parish they clearly do not extend: I am therefore of opinion that the jury have gone too far; for it is proved that Hill is a part of this parish, and is not under the operation of these *moduses*. But if I were to send this cause down to another trial, and the jury found these facts specially, it would answer no purpose to the defendant in this cause. This point not appearing in the pleadings in Equity, was a surprise on the plaintiffs. The defendant at Law claimed tithes in Equity; and the question was, whether he was entitled to the tithes in kind or only to *moduses*; and on this the plaintiffs go to an issue, affirming that there are these *moduses* over the whole parish: and, in answer to this, the defendant proves that they do not extend over the whole of the parish, for that a part of it, in the tithes of which neither he nor the plaintiffs have any interest whatever, is not covered by the *moduses*. The issue was directed to ascertain the rights of these parties; and when the issues were directed, they were to try whether these *moduses* existed over the parish of Berkeley, as they respected the rights of the defendant. The Court did not send them down to determine whether they extended to a parish of that parish in which the defendant had no right. I therefore certainly shall not send this case down to a

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new trial; but, at the same time, I must not leave it as matter of record that these *modus* extend over the whole of this parish, as that tends to work injustice to third parties. I will, therefore, take time to consider of it.

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The VICE-CHANCELLOR said, that as the verdict, as between these parties, was a correct one, and as the point raised was a surprise on the plaintiffs, and calculated to defeat the justice of the case, he should refuse the motion, with costs.

COURT OF KING'S BENCH.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITTLEDALE, JJ.

In Bank.

Feb. 1st.

MONTAGUE v. ESPINASSE, Esq.

A husband is not liable for goods supplied to his wife while she is living with him, unless such goods are supplied under his authority or by his assent; and a plaintiff, to support an action against the husband, must give some proof of assent on the part of the husband. If a husband put away his wife without reasonable cause, he is bound to pay debts she may contract for necessaries; and if she is living with him, and he will not supply her with necessaries, though her proper remedy is in the Spiritual Court, yet it might be held, that the husband was liable for the amount of necessaries supplied to her. But if she is supplied with necessaries by her husband, he is not liable on any contract made by her, even for necessaries, unless there be evidence that she was authorized by him, and acted with his assent.

SEE *ante*, p. 356. The rule *nisi* granted in this case now came on to be argued.

Platt shewed cause; and contended, that the case had been properly left to the jury, who could not be said to have come to a wrong conclusion. It was left to the jury to say, whether these goods were supplied to Mrs. Espinasse with the assent of her husband, who was eminent in his profession, and living in a handsome house; and the plaintiff had a right to presume he was living according to his means; and if husband and wife are

If a husband put away his wife without reasonable cause, he is bound to pay debts she may contract for necessaries; and if she is living with him, and he will not supply her with necessaries, though her proper remedy is in the Spiritual Court, yet it might be held, that the husband was liable for the amount of necessaries supplied to her. But if she is supplied with necessaries by her husband, he is not liable on any contract made by her, even for necessaries, unless there be evidence that she was authorized by him, and acted with his assent.

together, and the goods supplied are suitable to agree, the assent of the husband may be presumed. said that there was no proof that Mrs. Espinasse wore any of these articles. But the question, whether they were suitable to her degree, was left to the jury, who have found their verdict on that question: and the plaintiff to be called upon to prove that the defendant saw the goods worn by his wife, as that would be only known in the family? And he cited *Morton v. Skinn.* 348 (a). In that case, it did not ap-

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the case of *Morton v. Wi-*
inn. 348, in which a Ser-
Law was the defendant,
action to recover the price
of silver fringe and
applied to the defendant's
a petticoat and side-sad-
were of the value of 94*l.*
ence was, that the defend-
his wife had had a dispute,
t she had said, that she
cur debts with a view to
TREBY, C. J., left it
ury to say, whether the
was privy to the wife's
o ruin her husband; and if
ether the goods were suit-
he quality of the wife; for,
were, the plaintiff was en-
recover. In the case of
pton v. Parrott, 2 *Ld.*
36, Lord HOLT says, "If a
l turns away his wife, he
er credit wherever she
d must pay for necessities
but if she runs away from
shall not be liable to any
contracts; for it is the co-
on that is an evidence of
band's assent to contracts
y his wife for necessities:
he husband has solemnly
d his dissent that she shall

not be trusted, any person that has
notice of this dissent, trusts her at
his peril after: for the husband is
only liable upon account of his
own assent to the contracts of his
wife; of which assent, cohabitation
causes a presumption; and when
he has declared the contrary,
there is no longer room for such
presumption. For the wife has
no power originally to charge her
husband, but is absolutely under
his power and government, and
must be content with what he pro-
vides; and if he does not provide
necessaries, her remedy is in the
Spiritual Court. But here were
sufficient necessities provided, and
also the husband had forbid any
trusting her. And notice to the
defendant's servant, usually em-
ployed by him in his trade, was a
good notice to his master, the
plaintiff, and he cannot charge
the defendant." And his Lordship
afterwards added, "If a wife takes
up silks, and pawns them before
they are made into clothes, the
husband shall not be liable for the
silks, because they never came to
his use: *contra*, if they were made
into clothes and worn by the wife,
and then pawned by her."

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pear that the defendant ever saw the goods worn. There is not the slightest evidence to shew that the plaintiff knew that the defendant disapproved of the supplying of the goods; and the Court will never order a nonsuit to be entered, unless they see that no verdict for the plaintiff could be given.

Scarlett, contra. The cited case appears to have gone a good deal on the ground of the defendant being a Serjeant at Law, which is not so here: but I take the law to be, that a wife may charge her husband for necessaries, but not for articles of jewellery, unless he assents, which assent may be presumed, from his seeing her wear them or the like. Now, the evidence is, that none of the family ever saw any one of these articles; and that the plaintiff always wished to avoid communicating with the defendant; and the plaintiff must know, that, as a special pleader, the defendant ought not, and could not, fit out his wife with jewels at this most extravagant rate; and therefore he trusted her in confidence of her own means.

BAYLEY, J.—I am of opinion, that in this case a nonsuit must be entered, as there was no evidence to charge the defendant. If a man put away his wife without reasonable cause, he is bound to pay such debts as she may contract for necessaries only; or if she is living with him, and he will not supply her with necessaries, though her remedy is properly in the Spiritual Court, yet, it might be held, that her husband was liable for necessaries supplied to her: but if she is living with her husband, and is supplied by him, he is not bound by any contract made by her even for necessaries, unless there be evidence that she was authorized by him, and acted with his assent. It appeared in this case, that the defendant was working hard at his profession, as a special pleader, and did not keep a man servant, and was living in a ready-furnished house. Now, could it be supposed for a moment, that he could

authorize his wife to spend upwards of 80*l.* in jewellery, in about six weeks? if the defendant had looked at their house, he must have seen that the furniture did not at all correspond with the jewels he was selling. It is the duty of every tradesman, when he trusts a lady with jewels to this amount, and unsuitable to her degree, to ask her husband whether he has given her any authority to order them: he might very easily say—"It is the rule of our house, before we execute an order to this amount, to refer to the lady's husband on the subject;" and it is his bounden duty to do so. In the case of *Etherington v. Parrott*, 2 *Ld. Ray.* 1006, Lord HOLT distinctly says, that a wife, living with her husband, cannot charge her husband by any contracts she makes, unless by his assent; and that rule has been acted upon ever since. I am clearly of opinion, that, in this case, there was no evidence to go to the jury of any assent on the part of the husband, and that, therefore, a nonsuit must be entered.

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Esq.

HOLROYD, J.—I am clearly of opinion, that a husband can only be liable even for necessities furnished to his wife, when the wife is not supplied by him; and therefore if a tradesman supplies her, without first ascertaining that she is not supplied by her husband, or that she has authority from her husband, such tradesman supplies the goods at his own risk. If she is supplied with necessities by her husband, a tradesman can only recover for such goods as he supplied to her with her husband's assent; and, that the husband did assent, must be proved on the part of the plaintiff in every action founded on such a supply of goods. And to charge the husband, it is not enough that the wife should have asserted, that she had her husband's authority; for, if it were, a wife might go to many tradesmen, and pretend that she had her husband's authority for the orders she gave, and any man might be utterly ruined in a few days by the imprudence of his wife.

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 v.
 ESPINASSE,
 Esq.

LITTLEDALE, J.—The rule is, that a husband cannot be charged on contracts made by his wife, unless his assent can be shewn. In this case there was clearly no express assent; and the question therefore is, can any assent be implied from the circumstances of this case? In Com. Dig. tit. *Baron & Feme* (Q), (where the authorities are collected on this subject), it is laid down, that if a wife buy necessary apparel for herself, the assent of the husband shall generally be intended; but these goods were not articles of apparel, but of ornament, and that of a most expensive kind. It was also contended, that these articles were suitable to the state and degree of the defendant; but they clearly were not wanted for the wife of a person in his profession and station in life, and were in fact never worn: and if a tradesman supplies goods to a wife, without previously having the assent of her husband, he does so at his own risk; and I certainly think, there was, in this case, no evidence of any assent on the part of Mr. Espinasse.

ABBOTT, C. J.—I quite agree with the opinions delivered by my learned Brothers; and I sincerely hope, that our decision will introduce more care into the dealings of parties than at present there appears to be. Our decision will be sometimes beneficial to husbands, to fathers, and to friends; but it will be most often beneficial to those persons who have goods to sell; as it will make them more cautious of letting their goods go out of their hands, without knowing who is to pay for them: and the experience of Courts of Justice shews us, that persons, very frequently indeed, have sold their goods, without the slightest chance of ever getting paid the price of them.

Rule absolute for entering a nonsuit.

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PARKINS and Another v. MORAVIA.

Feb. 1st.

SEE *ante*, p. 376. The questions raised in this cause were, by consent, turned into a special case.

AUSTIN, Esq. v. WARD.

Feb. 1st.

SEE *ante*, p. 370. The rule *nisi* for a new trial in this case now came on to be argued. The only point made, was, whether the acts of bankruptcy were or were not concerted? The point ruled by the Lord Chief Justice at the trial, was acquiesced in by both sides.

The Court granted a new trial, on payment of costs.

JOSEPHS v. PEBRER.

Feb. 4th.

SEE *ante*, p. 341. The rule *nisi* in this case for a nonsuit, or a new trial, now came on to be argued.

Marryatt shewed cause. It was objected at the trial, that this was an illegal company within the statute 6 Geo. 1, c. 18.

A sale of shares in the Equitable Loan Bank Company is void.

Every company assuming to act as a body corporate, without the author-

ity of an act of Parliament, or the King's charter; or having a great number of shares generally transferable, is an illegal company: and though persons may, before obtaining either the sanction of an act of Parliament or the King's charter, legally associate themselves for the purpose of endeavouring to obtain such an act of Parliament, yet, if they issue out a number of such shares, the sale of them is illegal: and if a defendant has directed the plaintiff to buy such shares for him, and he does so, the plaintiff cannot maintain any action to recover the money he has so expended, as he was dealing in shares in an illegal company.

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BAYLEY, J.—Is this a company by act of Parliament or by charter?

Marryatt. Neither, my Lord. But we are not seeking to set up a contract for shares in it, but merely to recover back money laid out by us in the purchase of shares by order of the defendant. The case of *The Birmingham Mill Company* shews, that if a company does not tend to the common grievance of the King's subjects, it is not an illegal company.

BAYLEY, J.—The Court thought, in that case, that the shares were not generally transferable, the holding of them being virtually restricted to persons living in the neighbourhood of Birmingham.

Marryatt. Lord ELLENBOROUGH, in the early part of his judgment in that case, says, that only companies which are dangerous and mischievous are meant; and it does not appear, in the present case, that this was a mischievous and illegal company. I submit, that the plaintiff would be entitled to recover, unless the plaintiff had laid out the money in the purchase of something made out to be clearly illegal, because the plaintiff seeks to recover money laid out by him at the defendant's own request; for the defendant directed the plaintiff to buy these shares, such as they were, and now the defendant will not repay him the money he paid for them. Now, even if these were shares in an illegal company, I should submit, that, as the defendant himself directed the purchase of them, he would still be liable to repay the plaintiff the amount he had expended for him. This was the point for a nonsuit. The first point, on which the new trial was applied for, was, that the bought-note sent by the plaintiff to the defendant ought to have been stamped. I contend, that it did not require any stamp; for this action was not brought on the contract; and, further, that this was not a minute

or memorandum of a contract within the meaning of the stamp act ; but was merely an intimation by the agent to his principal of what he had done.

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BAYLEY, J.—This note did not contain the contract between the parties, nor was it to be binding on either party, nor intended to be evidence of the contract.

Marryatt then contended, on the question that the shares had been delivered too late, that, as they were bought “for the coming out” of the loan, the coming out must be taken to consist of many days ; as so large a number of shares could not all be issued in one day, the number of shares in this loan being forty thousand.

ABBOTT, C. J.—Must not all the shares come out on one day ? If it were otherwise, one person might sell his shares before another had got his.

Andrews, on the same side. I submit, that the defendant, to succeed in this case, must have given distinct evidence that this company was illegal within the statute 6 Geo. 1. Now, that he certainly has not done. This company is called “The Equitable Loan Bank Company,” and, from its name, it is to be presumed to be what the law would encourage.

ABBOTT, C. J.—But the company professes to have a capital of two millions, when, in fact, there was no such capital, and when a one-pound deposit was all it possessed.

Gurney, in support of the rule. At the trial, we were not left in the dark as to what the company was ; for it was stated by the plaintiff’s Counsel to be the most benevolent company on earth, for the company were to lend money at the moderate rate of eight *per cent.*, whereas the

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pawnbrokers charged twenty. Now, as to the illegality of the company. They profess to have a capital of two millions, whereas they have only forty thousand pounds; and besides this, they have small shares to the number of forty thousand, all transferable to any one who chooses to buy them. This is quite enough to shew, that this is one of those dreadful speculations which inflicted so great an injury in this country about a century ago, and which, if not checked, would do a similar injury now. If any company ever fell within the purview of the act of Parliament this is it. Another very important circumstance is, that these shares were at the time non-existent, and therefore the money was laid out in the purchase of what was really nothing. [He was then stopped by the Court, as was *Chitty*, who was to have argued on the same side.]

ABBOTT, C. J.—I am clearly of opinion, that in this case a nonsuit must be entered. From the evidence it appears, that a number of persons associated themselves together to form a large company, called “The Equitable Loan Bank Company.” On the evidence, the object of this company did not very distinctly appear; but it was admitted, on both sides, to be a company for the lending of money at a rate of interest higher than is allowed by law to be taken by any, except persons subject to the regulations respecting pawnbrokers. There is, in point of law, no objection to a company being formed prospectively, for the purpose of obtaining the authority of an act of Parliament, or of the King’s charter, provided, that before they act as a company, they obtain one of those two sanctions: but if, as in this case, they issue certificates for a great number of small transferable shares, and provide, that the members of the company shall submit themselves to the regulations or by-laws made, or to be made, by certain directors, before any authority has been obtained by act of Parliament, or a charter from the Crown for that pur-

and, then I am of opinion that they are an illegal company within the meaning of the statute 6 Geo. 1, c. 18: first, by pretending and assuming to act as a corporate body without legal authority; and, *secondly*, by issuing out a great number of small shares, generally transferable, to any person who chooses to buy them. I have, therefore, no doubt that this company is an illegal one; and that, being so, the dealing in these shares is unlawful, and that, therefore, all contracts respecting them are null and void. The traffic in shares of this kind must be highly injurious, what is gained by one person must be lost by another; and, in commerce, every party may be a gainer.

BAYLEY, J.—It is clear, that this association was within the meaning of the statute 6 Geo. 1, c. 18. The wording of that statute is certainly not clear; but after reciting (18) that persons had contrived dangerous and mischievous undertakings or projects, under false pretences to the public good, and had presumed to open books for public subscriptions, and drawn in many unwary persons to subscribe therein, towards raising great sums of money; and that the undertakers or subscribers had presumed to act as if they were corporate bodies, and pretended to make their shares in stocks transferable or assignable, without any legal authority, either by act of Parliament or charter from the Crown; provides, that all such undertakings and attempts, and all other public undertakings and attempts, tending to the common grievance, prejudice, or inconvenience of his Majesty's subjects, or great numbers of them, shall be deemed illegal and void. Now, in this case, it appears, that the individuals forming this company acted as a public company, and that they had all transferable shares; and though Mr. *Marryatt* appears to consider, that it has been decided that a company having transferable shares is not illegal, yet I take a distinction to be, whether the shares are generally transferable or not: for if the shares are generally trans-

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ferable, without restriction, to any one who is able to purchase them, then the company becomes illegal. And in the case of *Rex v. Webb and Others*, 14 East, 406, Lord ELLENBOROUGH considers, that if the Birmingham Flour Company had presumed to act as a body corporate, or if their shares had been *generally* transferable without restriction, that would have been an illegal company. But, in that case, the transfer of shares was much limited. No one person could have more than twenty shares of one pound each; and they could not transfer their shares to any person without the consent of the committee. There is also the case of *Pratt v. Hutchinson*, 15 East, 511, which was the case of a subscription for the building of houses near Greenwich, by means of which each of the subscribers was successively to have a house built for him at the society's expense, in an order to be determined by lot; but in that case, the subscribers were, of necessity, restricted to persons who were either living, or about to live in that neighbourhood; and further, the shares could only be transferred to persons who consented to become parties to the original articles, and persons who were approved of at a meeting of the society. Now contrast these cases with the present.—In this case, for some purpose that does not distinctly appear, forty thousand shares are created, and all of them are to be generally transferable to every body. The Legislature, by an act of Parliament, or the King, by his charter, might make this legal; but in this case, there has been neither act of Parliament nor charter. I am therefore of opinion, that this is contrary to the act of Parliament, and that the plaintiff, having lent himself to contravene the act of Parliament, cannot recover in this case.

HOLROYD, J.—I am of the same opinion. As these shares were to be generally transferable, I think the plaintiff cannot recover in this case.

LITLEDALE, J.—In my opinion, this case clearly falls within the statute 6 Geo. 1, c. 18. To bring a case within the operation of that statute, it must appear that the pretended company tends to the common grievance of a great number of the King's subjects; and the question is—Does not this company tend to that effect? In my opinion it certainly does; for all undertakings, having small transferable shares, especially if they assume to be by a corporation, are declared by the Legislature to be to the common grievance, and to be illegal. In the present case, this company do pretend to be a body corporate; for, before they obtain the authority of an act of Parliament, or the King's charter, the shareholders are to be governed by the regulations made by a committee; which is saying, in effect, that the forty thousand shareholders are to be a great corporation, this committee being the select body. In the next place, these shares are generally transferable, without any kind of limit or restriction; and, *prima facie*, this is an undertaking to the grievance of great numbers of the King's subjects. In all the cases, the transfer of shares had been limited in such a way as to make them not generally transferable: perhaps if it had been shewn that the objects of this society were perfectly legal and good, the society might not have been illegal; but so far from that, the object of it, as far as the Court are informed, is to lend money at a rate of interest greater than is allowed by law to be taken by any persons who do not subject themselves to the regulations respecting pawnbrokers: so that this is, in fact, a company to lend money at usurious interest: and without every one of the forty thousand shareholders was to become a pawnbroker, and conform himself to the regulations established concerning persons so trading, this company is most clearly an illegal one. But, even if that were not so, as it is not shewn that this company was established for a legal purpose, the plaintiff is certainly not entitled to recover in this action.

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ABBOTT, C. J.— Though that point has not been argued at the bar, I am of opinion, (as at present advised), that at common law the sale of these shares would be illegal and void ; as it is, in effect, a wagering whether an act of Parliament will pass to legalize them or not.

Rule absolute for entering a nonsuit.

The eighteenth section of the statute 6 Geo. 1, c. 18, commonly called the Bubble Act, recites, that “Whereas it is notorious, “that several undertakings or pro- “jects of different kinds have, “at some time or times since the “four and twentieth day of June, “one thousand seven hundred “and eighteen, been publicly “contrived and practised, or at- “tempted to be practised, within “the city of London, and other “parts of this kingdom, as also in “Ireland, and other his Majes- “ty’s dominions, which mani- “festly tend to the common griev- “ance, prejudice, and inconve- “nience of great numbers of your “Majesty’s subjects in their trade “or commerce, and other their “affairs; and the persons who “contrive or attempt such dan- “gerous and mischievous under- “takings or projects, under false “pretences of public good, do “presume, according to their “own devices and schemes, to “open books for public subscrip- “tions, and draw in many unwary “persons to subscribe therein to- “wards raising great sums of “money, whereupon the subscri- “bers or claimants under them “do pay small proportions there-

“of, and such proportions in the “whole do amount to very large “sums; which dangerous and “mischievous undertakings or “projects do relate to several “fisheries, and other affairs, “wherein the trade, commerce, “and welfare of your Majesty’s “subjects, or great numbers of “them, are concerned or inter- “ested: And whereas in many “cases the said undertakers or “subscribers have, since the said “four and twentieth day of June, “one thousand seven hundred “and eighteen, presumed to act “as if they were corporate bo- “dies, and have pretended to “make their shares in stocks “transferable or assignable, with- “out any legal authority, either “by act of Parliament, or by “any charter from the Crown “for so doing; and in some cases “the undertakers or subscribers, “since the said four and twen- “tieth day of June, one thousand “seven hundred and eighteen, “have acted or pretended to act “under some charter or charters “formerly granted by the Crown “for some particular or special “purposes therein expressed, but “have used or endeavoured to “use the same charters for raising

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“ joint stocks, and for making
“ transfers or assignments, or pre-
“ tended transfers or assignments
“ for their own private lucre,
“ which were never intended or
“ designed by the same charters
“ respectively; and in some cases
“ the undertakers or subscribers,
“ since the said four and twentieth
“ day of June, one thousand se-
“ ven hundred and eighteen, have
“ acted under some obsolete char-
“ ter or charters, although the
“ same became void or voidable by
“ nonuser or abuser, or for want
“ of making lawful elections,
“ which were necessary for the
“ continuance thereof; and many
“ other unwarrantable practices
“ (too many to enumerate) have
“ been, and daily are and may
“ hereafter be contrived, set on
“ foot, or proceeded upon, to the
“ ruin and destruction of many of
“ your Majesty's good subjects, if
“ a timely remedy be not pro-
“ vided: And whereas it is be-
“ come absolutely necessary, That
“ all public undertakings and at-
“ tempts, tending to the common
“ grievance, prejudice, and incon-
“ venience of your Majesty's sub-
“ jects in general, or great num-
“ bers of them, in their trade,
“ commerce, or other lawful af-
“ fairs, be effectually suppressed
“ and restrained for the future, by
“ suitable and adequate punish-
“ ments for that purpose to be as-
“ certained and established: Now
“ for suppressing such mischiev-
“ ous and dangerous undertak-
“ ings and attempts, and prevent-
“ ing the like for the future, May
“ it please your most excellent
“ Majesty, at the humble suit

“ of the said Lords spiritual and
“ temporal, and Commons, in
“ this present Parliament assem-
“ bled, that it may be enacted;
“ and be it enacted by authority
“ of this present Parliament,
“ That from and after the four
“ and twentieth day of June,
“ one thousand seven hundred
“ and twenty, all and every the
“ undertakings and attempts de-
“ scribed, as aforesaid, and all
“ other public undertakings and
“ attempts, tending to the com-
“ mon grievance, prejudice, and
“ inconvenience of his Majesty's
“ subjects, or great numbers of
“ them, in their trade, com-
“ merce, or other lawful affairs,
“ and all public subscriptions,
“ receipts, payments, assign-
“ ments, transfers, pretended
“ assignments and transfers,
“ and all other matters and
“ things whatsoever, for fur-
“ thering, countenancing or
“ proceeding in any such un-
“ dertaking or attempt, and
“ more particularly the acting
“ or presuming to act as a cor-
“ porate body or bodies, the
“ raising or pretending to raise
“ transferable stock or stocks,
“ the transferring or pretending
“ to transfer or assign any share
“ or shares in such stock or
“ stocks, without legal authority,
“ either by act of Parliament, or
“ by any charter from the Crown,
“ to warrant such acting as a
“ body corporate, or to raise
“ such transferable stock or
“ stocks, or to transfer shares
“ therein, and all acting or pre-
“ tending to act under any char-
“ ter, formerly granted from the

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" ' Crown, for particular or spe-
" ' cial purposes therein expressed,
" ' by persons who do or shall
" ' use or endeavour to use the
" ' same charters, for raising a
" ' capital stock, or for making
" ' transfers or assignments, or
" ' pretended transfers or assign-
" ' ments of such stock, not in-
" ' tended or designed by such
" ' charter to be raised or trans-
" ' ferred, and all acting or pre-
" ' tending to act under any obso-
" ' lete charter become void or
" ' voidable by nonuser or abuser;

" ' or for want of making lawful
" ' elections, which were neces-
" ' sary to continue the corpora-
" ' tion thereby intended, shall,
" ' (as to all or any such acts,
" ' matters, and things as shall be
" ' acted, done, attempted, ende-
" ' voured, or proceeded upon,
" ' after the said four and twen-
" ' tieth day of June, one thousand
" ' seven hundred and twenty)
" ' for ever be deemed to be ille-
" ' gal and void, and shall not be
" ' practised or in any wise put
" ' in execution.' "

ATKINSON v. COLESWORTH.

Feb. 4th.

SEE *ante*, p. 339. The rule for setting aside the non-suit in this case now came on to be argued.

Scarlett and *Campbell* shewed cause; and contended, that the master had no prospective *lien* on the freight; and that there was no distinction between this case and that of an auctioneer or a factor. And they cited *Smith v. Plummer*, 1 B. & A. 375.

Gurney and *Chitty*, in support of the rule, argued, that the master was subject to liabilities which an agent in general was not subject to, and therefore he ought not to be bound by the general law applicable to the case of principal and agent. They relied, also, on the fact of the charter party being in this case made in the name of the master.

The Court were of opinion, that there was no solid distinction between this case and that of *Smith v. Plummer*, and therefore directed that the rule should be discharged.

CASES

AT

NISI PRIUS.

AT THE

Sittings after Michaelmas Term.

COURT OF KING'S BENCH.

Sittings at Westm. after Michaelmas Term, 1824.

BEFORE LORD CHIEF JUSTICE ABBOTT.

1823.

ING, Administratrix of SKYRING, v. GREENWOOD and, November 30.
Another.

UMPSIT for money had and received.

is action was brought by the plaintiff, who was the
istratrix of Major Skyring, deceased, against the
dants, Messrs. Greenwood and Cox, the army agents,
ymasters of the Royal Artillery, to recover the arrears

The plaintiff
being the re-
presentative of
a deceased
officer of artil-
lery, of which
corps the de-
fendants were

ters, they delivered to him an account current, in which they acknowledged themselves to
ceived from the year 1806 to the year 1820, pay according to an increased rate allowed
eder of the Board of Ordnance, dated August 28, 1806. Held that they could not in 1821
mitted to say that this admission was by mistake, as in 1816 the Board of Ordnance had
said that by the true construction of the order of 1806, persons in the situation of the
ad, were not entitled to the benefit of it; this announcement of the Board never having
ommunicated to the deceased by the defendants till the year 1821.

M M

1824

SKYRING,
Administra-
trix of
SKYRING,
v.
GREENWOOD
and Another.

of pay due to the deceased, as an officer of artillery, up to the time of his death. The defence was a sett off of monies which had been allowed to the deceased by the defendants under a mistaken construction of a general order of the Board of Ordnance, of the date of August 28th, 1806, relative to an increase of pay to artillery officers.

The case came on upon admissions, from which the following facts appeared:—The deceased was brigade major of Gibraltar, and was also a captain in the Royal Artillery, of which corps the defendants were paymasters. By a general order, signed by the secretary to the Board of Ordnance, dated July 28th, 1797, it was directed, by command of his Majesty, that the pay of subalterns of the Royal Artillery should be increased 1s. 1d. *per* day, provided they held no other commission; but this was not to affect the half-pay. By a like general order of the 28th of August, 1806, it was directed that from and after July 1st, 1806, the pay of majors of the Royal Artillery was to be increased 1s. 11d. *per* day, and that of captains holding the brevet rank of majors 2s. It also increased the pay of the various other ranks in the Artillery; but this order stated, that this increase of pay was to be under the same restrictions as the increase mentioned in the former order, and was not to extend to *persons holding two commissions*, or to the half-pay. This increase of pay was, in fact, allowed to all officers circumstanced as the deceased was, it being considered that a situation like that of brigade major of Gibraltar was not a second commission within the meaning of the order of August 28th, 1806. In the year 1816, the Board of Ordnance sent a communication to the defendants, announcing to them that they considered that persons in the situation of the deceased had never been entitled to the increase of pay under the order of August 28, 1806. However, notwithstanding this communication, the defendants still continued to debit themselves with this increased rate of pay

in their account with the plaintiff. There had been a running account between the deceased and the defendants, and in a statement of the account transmitted by them to the deceased up to November 5th, 1820, they gave credit to the deceased for the amount of this increased pay, as so much of his money in their hands. In the year 1821, the defendants wrote to the deceased, informing him that the Board of Ordnance had announced to them, that persons holding two ranks were not entitled to the increased pay, and claiming a repayment of £994. 14s. 5d., being the amount of the increase of pay from the year 1806 to the year 1821.

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SKYRINE,
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trix of
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Gurney, for the defendants.—It would be seen by that letter that his clients claimed a return of the increase from the year 1806, the Board of Ordnance having given notice that persons in the situation of the deceased had never been entitled to the benefit of the order of 1806; but on it being represented to that Board by the defendants, that they had paid large sums to various officers under an opposite construction of that order, the Board had consented to allow the pay up to the date of their notice in 1816, and had disallowed the pay afterwards. In the account transmitted by the defendants in the year 1820, they had given credit for these allowances by mistake, they having in fact never received them. This action being for money had and received, it could not be supported against the defendants, unless they had actually received the money, which, in fact, they have not. The defendants could have no objection to pay over all they ever received.

Sanlett and Brougham, for the plaintiff.—It is well known that paymasters always receive the money before they pay over any part of it. They informed the deceased of the drawback in 1821, they knowing from the Ordnance office, so early as 1816, that it would not be

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 SKYRING,
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 trix of
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allowed; and in the account delivered, four years after, they admit most distinctly that they have this money in their hands for the use of the deceased; and they were prepared to show, that the situation of brigade major of a garrison was not a commission.

ABBOTT, C. J.—The account, admitting the receipt of the money, was delivered by the defendants in the year 1821, they having received an intimation from the Board of Ordnance, so early as the year 1816, that the extra pay would not be allowed to persons holding situations such as those filled by Major Skyring. This being an action for money had and received, the plaintiff must prove that the defendants have received such money for the use of Major Skyring; and I am of opinion that the account is evidence to shew that; and that it further admits the money to be then in their hands. The question then is, whether, so very long after, the defendants can be permitted to say, that this was all a mistake, and then to make the plaintiff, in effect, refund the money. My opinion is, that they cannot; and I ground that opinion on this :—They receive an intimation from the Board of Ordnance, in 1816, that that increased pay will not be continued to certain officers; this, however, is not communicated to Major Skyring till 1821; but, on the contrary, the defendants admit the money to be in their hands. It would be very material to all men, and more especially so to military men, if a paymaster could admit a sum of money to be in his hands, and, four or five years afterwards, be allowed to say—It was all a mistake; I have not a farthing of yours in my hands, and as you have drawn on me on the faith of my having this money, you must pay me a large sum back again. I think, therefore, without at all considering the terms of the order, that the defendants having so long acquiesced in the admission they had made, they cannot be permitted now to dispute it.

Verdict for the plaintiff—

Scarlett and Brougham, for the plaintiff.

Gurney, for the defendants.

[Attornies—*Dynely & Gathie*, and *Fynmore & Clark*.]

1824.

SKYRING,
Administra-
trix of
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v.
GREENWOOD
and Another.

In Hilary Term, *Gurney* moved for a new trial, and the Court, after recommending that the point should be raised on a special case, granted a rule to shew cause.

REX v. CLIFFORD.

Nov. 30.

INDICTMENT for obtaining two bills of exchange of a hundred pounds each from Thomas Palmer, by false pretences.

The defendant was found guilty, and as soon as the verdict was pronounced,

Chitty applied to the Lord Chief Justice to order one of the bills to be impounded; he stated that it was in Court in the hands of one of the witnesses.

ABBOTT, C. J.—The bill was not put in evidence; any written paper that is in evidence I can order to be detained, but as this bill was not in evidence, I can make no order on the subject of it.

Practice.—

The Judge at the trial of a case cannot order any paper to be impounded, which is not given in evidence. It is not enough that it should be in Court in the possession of one of the witnesses.

Adjourned Sitzings at Westminster.

BEFORE LORD CHIEF JUSTICE ABBOTT.

December 2d. BARTLET, Gent. one, &c. v. DOWNES, Gent. another, &c.

The appointment of a person as steward of a manor for life is good.

If tenant in fee of a manor by deed ap-

points a steward of that manor for his life, and devises the manor in fee to a third person, such steward's appointment is valid, and he cannot be afterwards displaced by the devisee, when he becomes possessed of the manor under such devise.

If no evidence is given of the existence of a term to attend the inheritance since the year 1793, and the owner of the fee has acted as if it had been surrendered, the jury may presume that it has been surrendered, the purpose for which the term was created having been long since fulfilled.

MONEY had and received.

The real question to be tried in this case was, whether the plaintiff was entitled to the office of steward of the manor of Denbury, otherwise Runsel, in the county of Essex (a).

(a) In the case of *Boyer v. Dods-worth*, 6 T. R. 681, which was an action for money had and received, brought by the sexton of the cathedral of Salisbury, against the defendant, who had wrongfully (as he contended) shewn the cathedral, and for so doing received certain gratuities, Lord KENYON, after deciding that the action does not lie for gratuities, lays down, that "if there had been certain fees annexed to the discharge of certain duties belonging to this office, and the defendant had received them, an assize would have lain; and the action for money had and received to recover fees has always been considered as being substituted in the place of an assize." It therefore becomes material to ascertain for what offices an assize will lie. In *Jehu Webb's Case*,

8 Co. 47 b. it is laid down, that "an assize lies for the offices of steward, bailiff, or receiver of a manor." In that case, the question for what offices an assize would lie is very fully gone into; and, after stating that an assize will also lie for the offices of bailiff of a park, beadle of a hundred, packer of clothes, sheriff, if appointed for life, clerk of the Crown in Chancery, beadle of the house of Westminster, porter of the court of the Archbishop of Canterbury, Filazer of the Court of Common Pleas, registrar of the Admiralty Court, or of a bishop's Consistory Court, it is laid down that an assize lies for all offices of profit, but not for offices of charge and no profit; and for this the Year Book, 27 Hen. 8, 12, is cited. And in 2 Inst. 412, it is laid down, that an assize

A lady, named Ray, being tenant in fee of the manor, by a deed, executed in the month of July, 1821, granted to the plaintiff the office of steward of this manor, for the term of his natural life; and, by her will, devised the manor to Mr. Downes, the brother of the defendant. On her decease, he appointed the defendant steward of that manor. It was admitted, that there were copyholds in the manor, that the steward of that manor was entitled to receive fees, and that the defendant, as steward, had received fees to the amount of 6*l*. before the commencement of the action; and it was also admitted that the plaintiff had offered to continue to act as steward since the decease of Mrs Ray, but that he was not permitted to do so by Mr. Downes, the defendant's brother.

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&c.

Scarlett and *Chitty*, for the defendant, contended that the steward was the steward of the lord, and by no means annexed to the manor. The Crown might, perhaps, constitute a person steward for life; but in the case of a private person, if he conveyed away his manor, the former steward ceased to be steward to the new lord; and even if a party could encumber himself with a steward, yet such steward, being the servant of his lord, and not being attached to the manor itself, could not hold the office against the will of the purchaser of the manor.—Another ground of defence was, that Mrs. Ray was not tenant in fee of the legal estate; for that, by a family settlement of June 6, 1712, a term of five hundred years was created in certain property, of which the manor formed a part; it was a term to raise portions for younger children. This term was, by a deed dated February 2nd, 1785, assigned to attend the inheritance; and when, in the year 1793, this manor was bought by the husband of Mrs. Ray, it

lies for parcel of the profits of an office, if the party be only disseised of so much and not of the whole office; and that it lies not only for offices held in fee but for offices

in tail or for life: and L. C. B. COMYNS lays down, that a tenant for years or other who has not the freehold cannot maintain an assize. Com. Dig. tit. *Assize*, (B. 5).

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&c.

appeared that this term was still kept alive for the protection of the inheritance.

Marryat contended, that the circumstance of no evidence being given of the existence of this term since the year 1793, the jury ought to presume its surrender.

ABBOTT, C. J.—I think I ought to ask the jury, whether they consider this term to have been surrendered or not. It was created in the year 1712, for a purpose long since fulfilled, and the last account given of it, by the evidence adduced on the part of the defendant, is, that it was in existence in the year 1793. If the party now suing were the owner of the estate, he would be in a condition to produce the deed by which it was surrendered, if any surrender had taken place; but the plaintiff not having that deed (if there be such a one) and not having the means of compelling its production, cannot be expected to give any evidence on the subject.

The jury having stated that they presumed the term to have been surrendered, were directed by his Lordship to find a verdict for the plaintiff, which they accordingly did (b).

Marryat and *Ryan*, for the plaintiff.

Scarlett and *Chitty*, for the defendant.

[Attornies—*Bridges & Q.* and *Downes.*]

(b) In the case of *Harvey v. Newlyn*, Cro. Eliz. 859, Sir James Allington had granted the plaintiff, by deed, to be bailiff of his manor for life, and the defendant disturbed him in collecting the rents, the defendant confessed the seisin of Sir James Allington, and

his grant to the plaintiff, but said that Sir James had sold the manor to J. S., who had appointed him (the defendant) to be bailiff. All the Court were of opinion that the purchaser might discharge the plaintiff and revoke the grant, because it was not shewn that there was any

fee granted for the execution of it, nor any profits, and therefore it would be a mere office of trouble, and the plaintiff could not complain of the loss: "*but if he were to have had a fee or other profit in certain, for executing thereof, it had been otherwise.*"

And in the case of *Sir Robert Howard v. Wood*, Sir T. Jones' Rep. 126, (reported also in 2 Mod. Rep. 173, 2 Lev. Rep. 245, and 2

Show. Rep. 21,) it was held, that the stewardship of a manor was legally grantable in reversion for a term of years determinable on the decease of the grantee; but the Court were of opinion that it was not grantable for a term of years absolute, as it might then pass to executors and administrators, or be in abeyance after the decease of the grantee and before administration granted.

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DOWNES,
Gent. another,
&c.

BEFORE ABBOTT, C.J., BAYLEY, HOLROYD, & LITLEDALE, JS.

In Bank.

Scarlett moved for a rule nisi, for a new trial in this *January 26th.*
case, on both the grounds taken at *Nisi Prius*, and the
Court took time to consider.

The Court now gave judgment on *Scarlett's* appli- *February 1st.*
cation.

ABBOTT, C. J.—We think we ought to refuse Mr. *Scarlett's* rule. It was said, that the grant of the stewardship of a manor for life was not good by a subject, though it might be good if granted by the Crown, and that a subject could not create an office for life; but, here, the party does not create the office, but only grants that office to a particular person for life; and if the grantor could not displace his grantee, there is no reason why any other person should have the power of doing so. In the case of *Harvey v. Newlyn*, Cro. Eliz. 859, which was an action for disturbing the plaintiff in his office of bailiff of a manor, he had been appointed bailiff of the manor for his life; and the person who had so appointed him a bailiff

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&c.

sold the manor to another, who appointed the defendant. The Court held, in that case, that if it had been shown, that there were fees attached to the office, or any certain profits, the action would have been maintainable. On the other point: I left it to the jury to say whether the term had been surrendered or not. The defendant was admitted to be the brother of the present owner of the manor, and was therefore in a condition to give the best evidence of the existence of this term; and it appeared that it was in existence as a term to attend the inheritance in the year 1793. The general principle on this subject is, that whatever ought to have been done is presumed to have been done; and if the surrender of this term were not presumed, it would defeat the acts of the owner of the inheritance; and the Courts have, in many instances, held, that juries were at liberty, where the term had done its duty, and the owners of the estate had acted as if the term did not exist, to presume that it had been surrendered. We think it was rightly left to the jury, as this term goes entirely to defeat the acts of the real owner of the estate. It is also worthy of notice, that if this term were actually surrendered, the deed by which it was surrendered would not be in the power of the plaintiff but of the defendant, or of the gentleman under whom he claims to act; but this rather goes to the propriety of the finding of the jury than to the question to be left to them. For these reasons, we think we ought to refuse the rule.

Rule refused.

BEFORE MR. JUSTICE LITTLEDALE.

(Who sat for the Lord Chief Justice.)

REX v. LYNN and DERNEY.

December 3rd.

INDICTMENT for a nuisance in obstructing a common highway, which was laid in the indictment to be a common highway for carts, carriages, &c.

The way in question was a very narrow street, connecting Sidmouth-street, Mecklenburgh-square, with James Street. From the evidence, it appeared, that the whole of the streets, lanes, and passages, had been built on the estate of a person named Harrison, and that the way in question was arched, having buildings over it. It also appeared, that all ordinary carriages could pass along it under the archway, but that a waggon loaded very highly, as road waggons, and waggons carrying cotton usually are, could not pass under this arch for want of height.

F. Pollock and *Abraham* for the defendants, contended, that this was not a public highway, for that it could not have been dedicated to the public as a common highway, it being arched over; and that if a verdict of guilty was found in this indictment, the party who was the owner of the buildings over the archway, might be compelled to pull them down, to make the highway passable for all carriages whatsoever. It should, (if it were a way at all,) have been described specially, as it is, for if there were any dedication to the public, it was not general, but restricted by the size of the archway keeping out high carriages.

In an indictment for obstructing a common highway, the highway may be laid as a common highway for carts, carriages, &c., although it has always been arched over; provided that it is capable of being used by all ordinary carriages, and notwithstanding the archway be not sufficiently high to permit road waggons and other carriages of unusual dimensions to pass under it.

Gurney and *Chitty*, for the prosecution.—It has been proved to be a way generally used, and capable of being

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 v.
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used by all ordinary carriages, which is sufficient to constitute it a public highway; many public streets have arches over them, and more had formerly, Scotland-yard is so now, and Castle-street, Holborn, and St. Thomas's-street, Borough, were so formerly.

LITTLEDALE J.—I shall reserve the point, whether a way of this kind, which can be used by all ordinary carriages, is not a public carriage way.

If two persons are jointly indicted for obstructing a highway, and on the evidence no joint act of obstruction appears, the Judge will, as soon as the case for the prosecution is closed, put the prosecutor's Counsel to elect which of them they would proceed against, and then take an acquittal for the other.

The defendants had one succeeded the other in the occupation of a house at the place in question, and there being evidence of an obstruction of the way by the defendants separately, but no evidence of any obstruction by them both at the same time —

LITTLEDALE J.—Put it to the Counsel for the prosecution, to elect which defendant they would proceed against, as no joint offence was in evidence.

Gurney electing to proceed with the case against the defendant, *Debney*,

The jury found him guilty, the other defendant not guilty.

Gurney and *Chitty*, for the prosecution.

F. Pollock, for the defendant *Lynn*.

Abraham, for the defendant *Debney*.

[Attornies.—*Harmer* and *Hurd*.]

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BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITLEDAL, JS.

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IN Hilary Term, *Abraham* moved on the point reserved, and argued, that in the indictment, this highway should not have been laid generally to be a public highway for carts and carriages, but specially as a highway, *sub modo*, for carriages of a certain description, as it had never been dedicated to the public except for a restricted use by carriages not exceeding certain dimensions.

Per Curiam.—If it is a way fit for all carriages which are in ordinary use, it is properly laid in the indictment to be a public highway for carts, carriages, &c., although some carriages of unusual size may not be able to use it.

Rule refused.

WHARTON v. LEWIS.

December 6th.

BREACH of promise of marriage.

The promise was proved by parol evidence, and the plaintiff's witnesses were cross-examined as to certain misrepresentations made to the defendant's father relative to the circumstances of the plaintiff's family, and the situations she had previously filled.

The defence was, that the defendant had made the pro-

In an action for breach of promise of marriage, if it appear that the defendant was induced to make the promise, or to continue the connexion, either by misrepresentation or

wilful suppression of the real state of the circumstances of the family and previous life of the plaintiff; this goes in bar of the action, and not to the damages only: and if the defendant's Counsel cross-examines as to certain misrepresentations made towards the defendant, and deceptions practised on him; this is to be considered as notice to the plaintiff's Counsel of the line of defence; and therefore if he has letters of the defendant, tending to shew that he knew the real state of the facts, the plaintiff's Counsel ought to give them in evidence before the plaintiff's case is closed, and he will not be allowed to put them in as evidence in reply.

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mise under fraudulent and false representations of the plaintiff's former situation, and the circumstances of her family; and it was proved that her brother (in whose house she was residing, and who was a witness for the plaintiff) had stated to the defendant, previously to the promise, that her father would leave property to her at his death; whereas, in fact, he had, a short time before, compounded with his creditors: and it also appeared from the evidence of the defendant's father, that, a few days after the promise, he received an anonymous letter, stating, among other things, that she had been a bar-maid, and had carried on the business of a milliner, at Oxford, with another lady who was then in keeping; and that the defendant in consequence broke off the match: but on this letter being shewn by the defendant's father to the father and brother of the plaintiff, they represented that these statements were false, and the courtship was renewed, but afterwards finally broken off. It was now proved that the plaintiff had acted as barmaid at Mivart's hotel, and had previously carried on the business of a milliner at Oxford under circumstances of suspicion, the marshal of the University having had directions from the proctors to keep a watch on the house.

As soon as the defendant's case was concluded, *Brougham* wished to give as evidence in reply, to cut down the evidence of the defendant's father, two letters written by the defendant, which went to disprove any deceptions, by shewing that he was aware of some of these facts before the match was broken off.

Scarlett objected that his cross-examination of the plaintiff's witnesses, as to the deceptions practised on the defendant, gave notice to the plaintiff's Counsel of what line of defence he was taking, and therefore the plaintiff's Counsel ought to have given these letters in evidence, to

shew that there was no deception, before he had closed his case, but that they were not admissible in reply.

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WHARTON
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ABBOTT, C. J.—By very strict rule, the cross-examination must be held to be notice to the plaintiff's Counsel that it was intended to be alleged by the defendant that deceptions had been practised; and therefore the plaintiff's Counsel ought to have gone into evidence to rebut that, before he closed his case. I think I must, therefore, reject the evidence.

Brougham having replied—

ABBOTT, C. J. left it to the jury to say, whether the defendant was induced to make this promise, or to continue this connexion, by false representations or wilful suppression of the truth; for if he was induced to continue the connexion by misrepresentation or wilful suppression of the real state of the circumstances of the family and previous life of the plaintiff, it was a good defence to this action, and the defendant was entitled to their verdict.

Verdict for the plaintiff—Damages 150*l*.

Brougham and *Abraham* for the plaintiff.

Scarlett and *Lawes* for the defendant.

[Attornies—*Manning* and *W. Hodgson*.]

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Dec. 13th.

JAY, Gent. one, &c. v. WARREN.

A *cognovit*, which merely gives the defendant time, does not require an agreement stamp.

Semble, that taking a *cognovit* of the acceptor of a bill after an action brought against him, and by that giving him three weeks' time before entering up judgment, is not such a giving time as will discharge the other parties to the bill.

ASSUMPSIT by the plaintiff as indorsee, against the defendant as indorser of a bill of exchange for 38l. 8s., drawn by a person named Elsam on a person named Brooke, three months after date.

The defence was, that the plaintiff had given time to the acceptor, by taking a *cognovit* of him which gave three weeks' time. The *cognovit* was tendered in evidence.

Brougham objected, that the *cognovit* ought not to be received in evidence as it was not stamped, and that it required a stamp, being used in this case as an agreement to give time to the acceptor, and it contains a clause that no judgment should be entered up till the 25th of May. That is clearly matter of agreement. A mere *cognovit*, certainly, required no stamp; but if it contained matter of agreement, it must bear an agreement stamp. *Eames v. Hill*, 2 Bos. & Pull. 150; *Reardon v. Swaby*, 4 East, 188.

ABBOTT, C. J.—If this *cognovit* is put in and read, is that a giving time within the meaning of the rule, because the party has brought his action against the acceptor, and by these means obtains judgment against him? Is there any decision which lays down, that if after action brought the party take a *cognovit* that is a giving of time? As at present advised, I think this *cognovit* admissible in evidence without a stamp; but I am of opinion that it is no answer to this action. The mischief of holding that this discharged the other parties to a bill would be infinite. Suppose the indorsee of a bill brought an action against the acceptor, who appeared and pleaded: if the indorsee did not file his replication so soon as he might do, it

would be said that he gave time to the acceptor. The defence cannot be sustained.

Verdict for the plaintiff.

Brougham for the plaintiff.

Hutchinson for the defendant.

[Attornies—*Jay & B.* and *Warren.*]

See *Lee v. Levy, infra.* In the case of *Ames v. Hill*, 2 Bos. & Pull. 150, it was held that a mere *cognovit* did not require a stamp; but that if it contained any thing of agreement beyond the mere authority, it must have an agreement-stamp.

And in the case of *Reardon v. Swaby*, 4 East, 188, it was held, that if the *cognovit* contained an agreement to take the debt by instalments, it must have an agreement stamp;—and recognised the authority of the case of *Ames v. Hill*.

PHILIPPE, Gent. one, &c. v. BAKER.

Dec. 14th.

ASSUMPSIT for business done as a solicitor, with the common money counts. Plea—General issue.

It appeared that a bill in Chancery had been filed against the defendant by a person named Allen, and that he had employed the plaintiff as his solicitor, to enter an appearance for him, and to put in an answer to that bill; but the defendant being poor, the plaintiff had, before the answer was put on the file, prepared a petition for him to defend that suit *in forma pauperis*, the prayer of which petition having been granted by the Lord Chancellor, the appearance in Chancery was entered, and the answer put in *in forma pauperis*, and the suit there had not proceeded any further. The amount of the plaintiff's bill was 14l. 14s. 6d.

If one is admitted to defend a suit in Chancery, *in forma pauperis*, his solicitor can only recover of him money actually paid out of pocket for the defence of the suit.

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PHILIPPE,
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ABBOTT C. J.—As the defence of the suit in Chancery was *in forma pauperis*, I am of opinion that the plaintiff, as his solicitor, can only recover the amount of the money he actually paid out of pocket.

Verdict for the plaintiff—Damages 2*l.* 1*s.* 4*d.* (a).

N. Clarke for the plaintiff.

The defendant in person.

[Attornies—*Philipe* and In person.]

(a) This sum did not include any thing either for attendance, loss of time, drawing or engrossing, copies, or service of orders; but only the money paid out of pocket by the plaintiff as solicitor, and the parchment on which the answer in Chancery was written.

Dec. 14th.

PARTRIDGE v. COATES.

Pleading. — In a declaration, for usury, the day from which the forbearance is to commence, is material, and must be truly stated. If no day is stated, it will be bad. If a wrong day is laid, it will be a fatal variance

DEBT for penalties for usury.

The first count of the declaration stated, that one Thomas Dauncey had drawn a bill of exchange, payable to his own order, which had been duly accepted by one Daniel Orphin; and that after the 29th day of September, 1714, to wit, on the 3d day of July, 1824, it was corruptly, &c. agreed between the defendant and the said Thomas Dauncey, that the defendant should lend and advance to the said Thomas Dauncey 100*l.*, “and should forbear and give day of payment for the same unto the said Thomas Dauncey, *from the time of lending the same,*” until the said sum of money (secured by the bill) should become due and payable, to wit, until the 6th of October next following; and that the defendant for such

forbearance should receive from the said Thomas Dauncey the sum of 6*l.* 5*s.* : and for the securing the 100*l.*, the bill was to be assigned to the defendant. And "that in pursuance of the said corrupt bargain and agreement so made as aforesaid, he the said defendant, afterwards, to wit, on the said 3*d* day of July, to wit, at, &c. did lend and advance to the said Thomas Dauncey the said sum of 100*l.*" &c.; it then proceeded to aver payment of the usurious interest, &c. The other counts of the declaration were similarly framed, as far as regarded the point on which the case ultimately turned.

From the evidence, it appeared that the defendant had received 6*l.* 5*s.* of Thomas Dauncey, and for that the defendant had discounted the bill mentioned in the declaration, by giving him a check on his banker, dated July 3*d*; but it was proved, that, in point of fact, the amount of the check was paid in cash to Dauncey on the 5*th* of July, and not on the third.

Denman, F. Pollock, and Holt, for the defendant, contended that this was a fatal variance, as the declaration stated a corrupt contract for an usurious loan from the 3*d* of July, and an advance of the money on that day. The time was, in cases of usury, most material, as being the only thing that made the taking the amount to be paid as interest, usurious or not, and therefore it ought to be truly stated. *Harris v. Hudson*, 4 Esp. 152; *Carlisle v. Trears*, Cowp. 671.

ABBOTT, C. J.—The distinction in this case is, that the forbearance is stated not to be from one day to another, but from the time of the lending.

The defendant's Counsel.—Then, my Lord, it would not be necessary to put any day at all, as the time from which the forbearance was to be; but we contend, that it must appear on the face of the record that usury

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has been taken, which can only be by a particular sum being taken for forbearance between two given days; and if the time is material, laying the day under a *vide licet* makes no difference.

Scarlett and Abraham, contra.—It is only necessary that the interest should be alleged to be usurious and taken on an usurious contract; and though if it be alleged that the contract was for forbearance between *given days*, those days must be proved, still no case has yet decided that it is necessary to state a precise day: and it is sufficient to allege that the sum was to be paid as interest from the time of the lending, and that it was at an usurious rate of interest.

ABBOTT, C. J.—It appears to me, that, in a declaration for usury, it is necessary to shew that the period of forbearance was such that the sum taken exceeded the legal interest. Here, it is only alleged to be from the time of the lending. Now, that might be so long a time from the other day as to make the sum received not exceed the rate of 5 *per cent.* for a year: and if it be said, that in this declaration there is a day stated, that is, the third of July, which is a wrong day, I think that the plaintiff must be called.

Nonsuit.

Scarlett and Abraham, for the plaintiff.

Denman, F. Pollock, and *Holt*, for the defendant.

[Attornies—*H. Thomas* and *Hodson*.]

In the case of *Carlisle, qui tam*, v. *Trears*, Cowp. 671, the plaintiff having declared on an usurious contract on the 21st of December, 1774, giving day of payment to

the 23d of December, 1776, and the evidence being of a contract on the 23d of December, 1774, for two years; this was held to be a fatal variance.

In the case of *Harris, qui tam, v. Hudson*, 4 Esp. 152, the day of the advance of the money was laid under a *videlicet*, but it was held that a variance in the day was fatal. And it was ruled in the cases of *Brooke, q. t., v. Middleton*, 1

Camp. 445, and *Borrodaile, q. t. v. Middleton*, 2 Camp. 53, that if the money is advanced upon usury by a check, the forbearance is only from the time at which the check is converted into cash.

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ORME, who sues, &c. v. CROCKFORD.

Dec. 15th.

DEBT, for penalties under the statute of 9 Ann. c. 14, for winning excessive sums of money at play. The penalties sought to be recovered amounted to many thousand pounds.

Practice.—If a case be not gone into, the Judge will not certify that it was a fit cause to be tried by a special jury, merely because the declaration is for penalties to a very large amount, and because persons of considerable rank are called on their *subpœnas*.

The plaintiff's Counsel, after having had several witnesses called on their *subpœnas*, some of them persons of high rank, stated (without the case having been at all gone into) that they were in no condition to prove their case, and the plaintiff was nonsuited.

The *Attorney-General* (as Counsel for the defendant) applied to the Lord Chief Justice to certify that this was a fit case to be tried by a special jury, from the nature of the case stated on the record, and the great amount of the penalties sought to be recovered.

ABBOTT, C. J.—I cannot certify that the cause was fit to be tried by a special jury on a mere view of the record.

The *Attorney-General*—But your Lordship has the additional circumstance of the high rank of some of the witnesses.

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continued practising as an apothecary, though the party attended different persons as patients.

On the part of the Company, no evidence was given that the defendant had not obtained his certificate from the Company.

Brougham objected, that it was incumbent on the Company to prove this. If in the act the certificate had been mentioned in a separate proviso, as an exemption from the penalty, it would then be matter of defence; but as it was incorporated in the clause which gave the penalty, it must be negatived by an averment in the declaration, and that averment must be proved.

Scarlett, contra.—I admit that it must be negatived in pleading; but as it is a negative averment, it need not be proved. In actions for penalties under the game laws, the plaintiff is obliged to aver that the defendant is not qualified to kill game, but he is not held to prove that averment.

ABBOTT, C. J.—As it is in the negative, the proof lies in the defendant.

Verdict for the Company for one penalty of 20*l*.

Scarlett and Campbell, for the Company.

Brougham and Platt, for the defendant.

[Attornies—*Hore & B.* and *Howard.*]

Negative averments in the declaration need not generally be proved on the part of the plaintiff. In the case of *Spieres v. Parker*, 1 T. R. 144, Lord MANSFIELD says, that

“ the plaintiff must, as in actions on the game laws, aver a case within the act; and therefore he must negative the exceptions in the enacting clause, though he

the burden of proof on the side."

In the case of *Jeffs v. Isaacs*, 1 C. Pul. 468, it is laid down, the plaintiff must state in his pleadings every thing that entitles him to recover; but that it is a different question what is to be proved by one party and what by the other.

In the case of *Rex v. Turner*, 5 S. 206, it was held, that in an information on the return of a writ of *habeas corpus* it is necessary to negate a defendant's qualification to be a game, yet it lies on the defendant to shew that he is qualified. In *Jeffs v. Isaacs*, above, Mr. Justice HEATH lays down that this is an averment necessary on the part of the prosecutor, but that the *onus probandi* point lies on the defendant. In the case of *Mann v. Da-*

vers, clerk, 3 B. & A. 103, where a party was convicted of returning to a parish from which he had been legally removed, without bringing with him a certificate from the parish to which he had been removed, it was held that the proof lay on him to shew that he did not return as a vagrant, but that he had lawful reason for so doing. However, in the case of *Rex v. Rogers*, 2 Camp. 654, which was an indictment on the statute 42 Geo. 3, c. 107, § 1, which makes it a felony to hunt deer in an inclosed park or ground, without the consent of the owner, Mr. Justice LAWRENCE held, that it was necessary to call the owner to prove that he did not consent. But this was probably on the ground that his not consenting was a matter peculiarly within his knowledge.

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GILLON v. BODDINGTON, Esq.

Dec. 17th.

REPORT on the case.

The declaration stated, that the plaintiff now is, and was, several times when a certain wall, after mentioned, suffered to remain undermined, injured, shaken, &c., when the soil under the said wall was washed away, and

The plaintiff, in 1822, had a remainder in fee in a wharf expectant on a tenancy for life of his father.

The defendants,

year, dug soil out of their dock which was contiguous, and the water thereby undermined the wall of the wharf. In 1823, the plaintiff's father died; and in 1824, the action of trespass on the wall had undermined it so far that it fell:—Held, that the plaintiff had a right of action against the defendants, although they had done no act since the death of the plaintiff's father, by which the plaintiff came into possession of the freehold of the wharf. By an act of Parliament, it was enacted, that the defendants (the London Dock Company) be sued within "six calendar months after the fact committed:—"—Held, that the liability ran from the time of the consequential injury happening, and not from the doing of the act which caused that consequential injury; as, here, the act itself was not tortious or injurious except from those consequences which occurred some time after.

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when a part of the said wall fell down, and the remainder thereof became in a ruinous state, seised in his demesne as of fee of and in the reversion of one undivided third part of a certain wharf, subject to a tenancy from year to year of Thomas Gray and William Thacker therein; and that the London Dock Company, on the first of January, 1818, and on divers other days and times between that day and the first of January, 1824, at, &c. wrongfully and unskilfully, had caused a great quantity of mud, &c. to be excavated and dug from the bed of a certain dock, called Hermitage-dock, by means of which a certain wall of the said wharf, (called Downe's-wharf), became undermined and shaken, and the soil under the same loosened, by the tide which flowed into the said dock from the river Thames; and that the Company negligently permitted the same to remain so undermined for a long space of time, to wit, seven years, until divers parts of the wall, on divers days since the 1st of January, 1824, fell down, and the remainder thereof became in so ruinous a state, that it was necessary, to prevent further damage to the wharf, that it should be taken down; by means of which premises the plaintiff was greatly injured in his reversionary estate and interest aforesaid, to a large amount, to wit, 2000*l*. Plea—General issue.

It was admitted that the defendant was the treasurer of the London Dock Company, who, by a private act of Parliament, 39 and 40 Geo. 3, c. 47, are to be sued in the name of their treasurer. And from the evidence, it appeared that the plaintiff was tenant in fee of an undivided third part of the wharf in question, subject to a tenancy from year to year; and that he had so become owner of it on the decease of his father (who had had an estate for life in it, under the will of a person named Downe), in the year 1823. And it was proved, that, in the year 1822, the London Dock Company had excavated the bed of one of their docks, called the Hermitage-dock, on one side of which the wall in question was; and that by such exca-

vation, the foundation of the wall was exposed to the action of the tide, and that a considerable portion of the wall fell in the year 1824, when it was considered absolutely necessary to take down the remainder of it, as it was then in a very ruinous state.

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v.
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Scarlett contended, that the plaintiff must be nonsuited; 1st, because the declaration stated, that the plaintiff was and now is seised of a reversion in fee, subject to a tenancy from year to year; whereas the injury being caused by the excavating done in 1822, the declaration should have been for an injury done to his reversion expectant on the tenancy for life of his father: and he further argued, that as the injury was done in 1822, in the father's lifetime, and he could have brought an action for it, the present plaintiff could not maintain any action at all. And 2nd, because the action, if maintainable, was brought too late. By the London Dock Act, 39 and 40 Geo. 3, c. 47, § 151, it is enacted, that "no action or suit shall be commenced against any person or persons for any thing done in pursuance of this act, until twenty days' notice shall be given to the person or persons against whom the same is to be brought, nor after a sufficient satisfaction or tender thereof hath been made to the party or parties aggrieved, nor after six calendar months next after the act committed; and such action or suit shall be laid and brought in the county of Middlesex, and not elsewhere: and the defendant or defendants in such action or suit, shall and may plead the general issue." Now the fact committed by the Company, which caused the damage, was in the year 1822, if at all, and therefore, more than six months having elapsed, the plaintiff must be called.

The *Attorney-General*, *Taunton*, and *Bayley*, contra. This is an action on the case, for a consequential damage; and it has been decided that in such actions for consequential damage, the period of limitation is not calculated

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from the time of the fact, but from the time of the consequential damage. *Roberts v. Read and Others*, 16 East, 215; *Sutton and Clarke*, 6 Taunt. 40 n. If an act be done which will probably occasion damage, no action can be maintained for it; and if it could not be maintained, now the damage has happened, the party grieved would be without remedy. As to the first point, the same principle applies. The consequential damage was after the decease of the plaintiff's father, as the wall fell in the year 1824.

Scarlett, in reply.—I submit, that there was a cause of action in 1822, because it was then known that the wall was undermined, although it had not then fallen; and the plaintiff coming in as a remainder-man, is not different from the case of a purchaser: and if one had purchased this wharf, knowing the state of the wall, could he be allowed to say, I will wait till the wall falls down, and then bring an action against the Company? I therefore contend, that, six months having elapsed since the injury was done, the plaintiff is barred; and, further, that as it was done before he became possessed of the property, he cannot recover on this declaration.

ABBOTT, C. J.—I think that the case of *Roberts v. Read*, is an answer, by way of authority, to the objection as to the limitation of the action; and I have great pleasure in finding that decision, as it shews the wisdom of the law in not too strictly adhering to the words of an act of Parliament, where they would work injustice. It also furnishes an answer to the other point. I take it that the washing away of the foundation of the wall had commenced before the plaintiff's title accrued; but for the falling of the wall, which occurred after, the plaintiff may recover. I think this case quite distinguishable from that of a purchaser for money; but I do not say that even then the action would not lie.

The defence was, that the wall fell through mere decay.
This was, however, not made out.

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v.
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Verdict for the plaintiff—Damages 500*l*.

Attorney-General, Taunton, and Bayley, for the plaintiff.

Scarlett, Bosanquet, Serjt., F. Pollock, and Carter, for the defendant.

[Attornies—*Brooksbank & Co.* and *Teesdale & Co.*]

In the case of *Roberts v. Read*, 16 East, 215, the surveyors of highways of Penzance had undermined the plaintiff's wall, which fell some months afterwards. By the statute 13 Geo. 3, c. 78, § 81, surveyors of highways must be sued within three calendar months after the fact committed; and this action was brought within three months after the wall fell, but more than three months after the

undermining. The Court decided, that if the action had been trespass, it must have been brought within three months after the act of trespass complained of; but being an action on the case for consequential damage, it could not be brought till the specific wrong had been suffered.

In the case of *Sutton v. Clarke*, 6 Taunt. 29, this point was not expressly decided.

FOOTE v. HAYNE.

Dec. 21st.

BREACH of promise of marriage.

By the evidence, on the part of the plaintiff (Miss Foote, the celebrated actress), it appeared that the defendant had made several distinct promises to marry the plaintiff, and had broken off the match after each of the promises. It also was admitted that the plaintiff had had

A party will not be allowed to go into evidence of the time when the Counsel for the opposite party was retained, either by calling the Coun-

sel's clerk or otherwise; as the retaining of Counsel falls within the rule respecting confidential communications.

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two children by Colonel Berkeley; but of this the defendant was aware after the breaking off the first promise, and before the making of the second.—The plaintiff's attorney was called, on the part of the plaintiff, and asked whether he had not, on or about the 29th of September, 1824, applied to Mr. *Scarlett's* clerk at his chambers, for the purpose of retaining him as Counsel, and whether he was not shewn a book? The object of this was, to shew that the defendant had retained Mr. *Scarlett* as his Counsel in any action the plaintiff might bring against him, on the very day on which one of the later promises was made.

Scarlett.—This is really not evidence. My clerk is in attendance, having been served with a *subpoena duces tecum*, to produce my retainer-book.

ABBOTT, C. J.—I cannot receive any evidence of the retainer of the opposite Counsel. I am decidedly of opinion that it ought not to be put in evidence, as it comes clearly within the rule with respect to confidential communications.

If, in an action for breach of promise of marriage, the defence set up is, that the defendant was induced to make the promise thro' misrepresentations made to him; and it is proved that the plaintiff knew that her father

wrote letters to the defendant, in which he made statements respecting her; such letters are evidence for the defendant, although there is no proof that the plaintiff had read them, or was acquainted with their exact contents: but the plaintiff would not be considered answerable for the particular expressions contained in them.

But a verbal representation made by the plaintiff's father (she not being present) to a third person, who communicated it to the defendant, is not evidence.

The defence was, that the defendant had been deceived into making these promises, by the false representations made to him by the plaintiff, and her father and mother with her knowledge.—On the cross-examination of the plaintiff's witnesses, it was proved that the plaintiff had told the defendant, when he first made his proposals, that she could not give any answer, till a promise of marriage she had made to Colonel Berkeley was put an end to: but that, in fact, at that time she was in a state of pregnancy; and that when she left London for her second ac-

couchement, she knew that her father, who remained in London, wrote letters to the defendant respecting her, though it did not appear that she knew the exact contents of any of these letters.

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The defendant's Counsel wished to give these letters in evidence, to shew the misrepresentations that were made to the defendant; the letters stating that the plaintiff had gone into the country for a pulmonary complaint.

The plaintiff's Counsel objected that they were not evidence, because they were written by a third person, and the plaintiff was not proved to have been acquainted with their contents.

ABBOTT, C. J.—As it is in evidence that the plaintiff assigned as the reason of her not giving an answer to the defendant's proposals, that she was under a promise to marry Colonel Berkeley, it is open to the defendant to give in evidence any thing to shew that that was not true; and as it is also in proof that the plaintiff knew that her father was making representations to the defendant respecting her, his letters are evidence, though the plaintiff will not be answerable for the particular expressions contained in them.

The letters of Mr. Foote were read.

The defendant's Counsel then wished to call a witness to prove that the plaintiff's father had (at a time when the plaintiff was not present,) made a representation to him of the good conduct and character of the plaintiff, which he had afterwards communicated to the defendant.

ABBOTT, C. J.—That is certainly not evidence. I have already received what, in the strictness of former times, would not have been thought admissible.

Verdict for the plaintiff—Damages 3000*l*.

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FOOTE
v.
HAYNE.

The *Attorney-General*, *Gurney*, and *Platt*, for the plaintiff.

Scarlett, *Brougham*, and *Adolphus*, for the defendant.

[Attornies—*G. Gill* and *Carter*.]

Dec. 22nd.

REX v. PARKINS, Esq.

Practice.—On the trial of an indictment for perjury, the Judge will allow the defendant to address the jury, and cross-examine the witnesses, and his Counsel to argue points of law, and suggest questions to him for the cross-examination of the witnesses.

INDICTMENT for perjury.

As soon as the case was called on, the defendant stated it to be his intention to address the jury in person, but he wished his Counsel to cross-examine the witnesses for the prosecution, and argue any matter of law that might arise.

ABBOTT, C. J.—The case may be conducted by the party himself as to matters of fact, and his Counsel may argue for him any point of law; but as to fact, I cannot allow the case to be partly conducted by the party and partly by Counsel.

Langslow, for the defendant.—In the case of *Redhead Yorke*, on the Northern Circuit (*a*), the party himself addressed the jury, but was allowed to have the assistance of Counsel to cross-examine the witnesses; and in the case of *Rex v. White*, 3 Camp. 98 (*b*), I understand that all that Lord ELLENBOROUGH meant to prevent was the irregularity of two cross-examinations for the same defendant.

(*a*) Tried at the York Assizes, before Mr. Justice ROOKE.

(*b*) In the case of *Rex v. Wright*, which was a trial of a misdemeanor, Lord ELLENBOROUGH ruled,

that the defendant might cross-examine and address the jury in person, and have the assistance of Counsel to argue any point of law.

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 v.
 PARKING.

Scarlett, contra.—In the case of *Redhed Yorke*, Mr. *Hotham*, a provincial Counsel, cross-examined the witnesses, and it was thought that he was retained to conduct the case of the defendant in the usual way; but when the prosecutor's case was concluded, he, to the surprise of every one, sat down, and the defendant himself rose to address the jury; and as the case then stood the learned Judge allowed him to proceed: but Lord ELLENBOROUGH (who was then at the bar) expressed his disapprobation of it.

ABBOTT, C. J. — The defendant may conduct the case in person as to matters of fact, and have the assistance of his Counsel to argue matters of law, but if he addresses the jury in person, he must cross-examine the witnesses; for if Counsel cross-examined, and the party spoke, great inconvenience would ensue. However, I shall allow the defendant's Counsel to suggest questions to him; and that he may have the full benefit of their assistance in that respect, he may, during the examination of the witnesses, sit at the bar with his Counsel, and return to the floor of the Court to address the jury.

This course was accordingly pursued; and the defendant cross-examined the witnesses (receiving suggestions from his Counsel from time to time), and addressed the jury in person; and his Counsel were prepared to argue for him any legal objection that might arise.

Scarlett, Adolphus, C. Phillips, and M. J. Quin, for the prosecution.

C. F. Williams and Langslow, for the defendant.

[Attornies—*Harmer and Duncombe.*]

1825.

Jan. 8th.

MAYHEW and Another v. EAMES and Another.

Notice to the principal is in law notice to all agents. Therefore, if stage-coach proprietors have given the usual $\text{5}l.$ notice to principals in London, in the month of January; and their traveller, who proves that he was ignorant of such notice, sends them, from Downham, a parcel, containing $87l.$, he has received for them in the month of February, by a coach belonging to these coach-proprietors, and it is lost, the coach-proprietors will not be responsible; the notice given to the principals being considered in law as notice to all their agents.

Whether the person sending a parcel, containing $87l.$, by a stage-coach, by writing the word "Mourning" on it, does not commit such a fraud on the coach-proprietors, as to exonerate them from liability.—*Quære*.

ASSUMPSIT against the defendants, who were proprietors of a stage-coach running from Lynn to London, for the loss of a parcel containing $87l.$ in country bankers' notes.

The plaintiffs were mercers in London; and it appeared that, on the 10th of February, 1824, the parcel had been delivered by the traveller of the plaintiffs to a person named Wright, who received parcels for this coach, at Downham, in the county of Norfolk, which is one stage on the road from Lynn to London, and that he put it into the coach. On the parcel there was written the word "mourning," although nothing of that kind was contained in it. It was also proved that the parcel was lost before it reached London.

Scarlett, for the defendants, objected, that the word "mourning" being written on it, was such a deception on the coach-proprietors, as to the value, as to deprive the plaintiff of his right of action.

ABBOTT, C. J.—The case had better proceed; but I will reserve the point if it should become necessary (a).

The defence proved was, that several times in the month of January, 1824, parcels coming by other coaches belonging to the defendants had been delivered by the defendants at the plaintiffs' house of business, and at each

the word "Mourning" on it, does not commit such a fraud on the coach-proprietors, as to exonerate them from liability.—*Quære*.

(a) See the cases of *Tyly v. Paynton*, 4 Burr. 2298; and *Bat-son v. Donovan*, 4 B. & A. 21. *Morrice*, Carth. 485; *Gibbon v.*

of such deliveries a ticket, stating the amount of carriage, was left, containing also the following notice :—

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MAYHEW
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& Another.

“John Eames, White Horse, Fetter Lane, whence passengers and parcels are conveyed by telegraph and other coaches to the principal sea-ports, cities, and commercial towns in the kingdom; also to the most fashionable watering places, particularly Brighton, Ramsgate, Worthing, Margate, Littlehampton, &c. Take notice, that the proprietors of carriages which set out from this office, will not hold themselves accountable for any passenger’s luggage, truss, parcel, or any package whatever, above the value of five pounds, if lost or damaged, unless the same be entered as such, and paid for accordingly when delivered here or to their agents in town or country; nor will they be accountable for any glass, china, plate, watches, writings, cash, bank-notes, or jewels of any description, however small their value.”

But of this notice the plaintiffs’ traveller proved that he was ignorant at the time he sent the parcel.

Denman, for the plaintiffs, objected, that this notice did not at all affect his case, because the notice, to be operative, must be given at the time the parcel is delivered to the carrier, and therefore deemed part of the contract; and as this notice never had been, at any time, communicated to the plaintiffs’ traveller who sent the parcel, and as the contract to carry it was made with him, this notice could form no part of such contract.

ABBOTT, C. J.—I am of opinion that the notice given to the plaintiffs is sufficient in this case to destroy their right of action. The traveller was their agent, and made the contract to carry solely on their behalf: and as it is so, the notice applies as much as if they had them-

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 & Another
 v.
 EAMES
 & Another.

selves given the parcel out to be carried. The plaintiffs must be nonsuited.

Nonsuit.

Denman and *Platt* for the plaintiffs.

Scarlett and *Carrington* for the defendants.

[Attornies—*Dax* and *Hinrich & Stafford*.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITTLEDALE, J.
 In Bank.

Jan. 24th.

Denman now moved to set aside the nonsuit, on the ground that the notice given to the plaintiffs on the delivery of other parcels could not affect this case, as the present parcel was not sent by them but by another person. The question turned on this, What was the contract between the plaintiffs' traveller and the defendants? If that was once made, no notice could alter it; and it was clear that the person so making it knew nothing of the notice so as to make it part of the contract; and there was no evidence of any circumstance which could induce the traveller to suspect that this was one of the defendants' coaches.

BAYLEY, J.—Was there no evidence that the coach had Eames's name on it, or White Horse, Fetter Lane?

Denman.—None, my Lord; and I contend that Mr. Eames cannot by a general notice exempt all the proprietors of all the coaches which may stop at his house from their common law liability.

ABBOTT, C. J.—I think it was brought to the plaintiffs' knowledge that the defendants would not be liable for

losses of parcels of above five pounds value sent by their coaches; and whether they did or did not know this coach to be the defendants', it was their duty to tell all their clerks not to send by any of the defendants' coaches, if they did not like their terms.

1825.
MAYHEW
& Another
v.
EAMES
& Another.

BAYLEY, J.—The plaintiffs knew that the defendants would not be answerable for losses above a certain value, as proprietors of any coach coming to the White Horse, in Fetter Lane; and, knowing that, it was their duty to order their traveller not to send by any of Eames's coaches, and if they omitted to do so, it was at their own risk. The notice having been given to them is sufficient, without also giving it to their agent; notice to a principal being in law notice to all his agents.

HOLROYD, J.—The plaintiffs bring the action on the ground that the contract was made by their agent and on their behalf, and the notice given to them was sufficient to cover all their agents.

LITLEDALE, J.—I take it to be clear that notice to the principal is notice to the agent, and *vice versa*.

Rule refused.

LEE v. LEVI.

Jan 8th.

ASSUMPSIT by the indorsee of a bill of exchange, drawn by a person named Jackson on a person named Byers, for 50*l.* two months after date.

Whether, after the indorsee of a dishonoured bill has brought actions against the indorser and the acceptor,

The defence was, that the plaintiff had given time to or, his taking a *cognovit* of the acceptor, for payment by instalments, is such a giving time as discharges the other parties to the bill—*Quære*.

1825.
 LEE
 v.
 LEVI.

the acceptor, Byers. However, it appeared that as soon as the bill was dishonored, the plaintiff brought actions against both the defendant and Byers, and that after both those actions were so brought, the plaintiff took a *cognovit* of Byers, and was to receive the amount from him by instalments of 5*l.* per month. This was the giving time relied on.

For the plaintiff, a witness was called to shew that the defendant was privy to that arrangement with Byers, and consenting to it.

ABBOTT, C. J.—Left it to the jury to say, whether the defendant had consented to the arrangement which had taken place between the plaintiff and Byers.

The jury found that he had not, and they, by his Lordship's direction, found for the defendant; his Lordship giving the plaintiff's Counsel liberty to move to enter a verdict for the plaintiff, in case the Court above should be of opinion that this was not such a giving time as would exonerate the other parties to the bill.

Brougham and *Platt* for the plaintiff.

Gurney and *Chitty* for the defendant.

[Attornies.—*Henson* and *C. Lewis*.]

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITTLEDALE, J.
 In Bank.

In the ensuing Hilary Term, *Brougham* moved, in pursuance of the leave given at the trial, for a rule nisi, for entering a verdict for the plaintiff, which was granted.

See the case of *Walwyn v. St. Quintin*, 1 Bos. & Pul. 652.

ned Sitings after Mich. Term, in London.

BEFORE LORD CHIEF JUSTICE ABBOTT.

HARTLEY v. CASE.

Jan. 12th.

MP SIT by the indorsee against the drawer of a
xchange, dated Mortlake, April 13, 1824, at four
after date, drawn by the defendant on his son for
was accepted, payable at No. 2, Upper King-street,
bury. On its presentation at that place, on the
which it became due, the answer was, that they
effects, but probably should have in the course of
. On the same day, the following letter was sent
efendant, as a notice of the dishonor of the bill:—

“ London, 16th August, 1824.

—I am desired to apply to you for payment of the
150*l.*, due to me on a draft drawn by Mr. Case on
ie, which I hope you will discharge, to prevent the
y of legal proceedings.”

Signed by the plaintiff.

defendant's Counsel objected, 1st, that this letter
notice of dishonor; it did not state that the bill
n dishonored, it only expressed a hope that the
nt would pay it; and a notice of dishonor ought
m the party of the dishonor as a substantive fact:
d, that the notice of dishonor (if any) was prema-
it was given on the day on which the bill became
hereas the acceptor had the whole of that day to
n; and that the dishonor was not a positive refu-
onor it, but, on the contrary, that they were in ex-
on of being able to do so.

Notice of the
dishonor of a
bill, after the
bill has actually
been dishonor-
ed, is good,
though given
on the very day
on which the
bill became
due, though the
refusal of the
acceptor is only
qualified, he
saying that he
has no effects,
but expects to
have them in
the course of
the day. *Semble*,
that in a letter,
intended as
a notice of
dishonor of a
bill, the disho-
nor ought to be
stated as a spe-
cific fact, and
that it is not
sufficient for the
letter merely to
demand the
money of the
drawer, and
leave him to in-
fer from that
circumstance
that it has been
dishonored.

1825.
HARTLEY
v.
CASE

ABBOTT, C. J.—I think the notice of dishonor was insufficient; it ought to explicitly tell the party that the bill has been dishonored, as a fact, and not leave it to be made out as matter of inference; and as the refusal to honor the bill was not positive, the plaintiff was too soon in giving notice of the dishonor, the acceptor having the whole day to pay it in.

Nonsuit.

Scarlett, Chitty, and Holt, for the plaintiff.

Brougham and Manning, for the defendant.

[Attornies—*Hartley* and *Harrison*.]

Jan. 26th

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITTLEDALE, JR.

In Bank.

Holt now moved to set aside the nonsuit in this case; and he argued, 1st, that the notice of dishonor was sufficient, because the notice of the dishonor of a bill need not be in any set form of words, and the use of it is only to put the drawer on his guard, and therefore any form of notice that lets him know that the drawee has failed in his engagement, is sufficient: and 2nd, that the notice of dishonor, as it was given after the actual dishonor of the bill, though on the same day, was good. And he cited the judgment of Mr. Justice BULLER, in the case of *Leftley v. Mills*, 4 T. R. 174.

ABBOTT, C. J.—I think the notice of dishonor given on the day on which the bill is payable will be good or bad as the acceptor may or may not afterwards pay the bill. If he does not afterwards pay it, the notice is good; and if he does, it of course comes to nothing.

The Court granted a rule nisi on both points.

1825.

WELBY v. DRAKE.

Jan. 12th.

ASSUMPSIT against the defendant as drawer of a bill for 18*l.* 3*s.* 11*d.*, which had been returned unaccepted.

It appeared that the plaintiff had agreed that if the defendant's father would pay him 9*l.* he would accept it in satisfaction of the whole debt; and this sum of 9*l.* was accordingly paid by the father.

Chitty, for the defendant, contended, that though a party himself, by paying a less sum than is due, does not discharge the debt, yet if, in consideration of a third person coming forward to pay a less sum, the creditor agrees to take it in satisfaction, and that a less sum is so paid, it cancels the debt.

ABBOTT, C. J.—If the father did pay the smaller sum in satisfaction of this debt, it is a bar to the plaintiff's now recovering against the son; because by suing the son he commits a fraud on the father, whom he induced to advance his money on the faith of such advance being a discharge of his son from further liability.

If one is sued on a bill of exchange, and it appear that the plaintiff has agreed with a third person that if he will advance part of the sum for the defendant, the plaintiff will take that in discharge of the whole debt, and such third person so advances it, that is a good defence to the action.

Verdict for the defendant.

———— for the plaintiff.

Chitty for the defendant.

[Attornies—*Fisher & Sudlow and Lake.*]

1825.

Jan. 18th.

**BLOXAM and Another, assignees of HENRY and SEALY
FOUDRINIER, Bankrupts, v. ELSEE.**

If by a private act of Parliament a privilege of the sole making of a newly-invented machine is vested in certain persons, with a proviso that it shall be forfeited in case it shall become "vested in, or in trust for, more than five persons or their representatives, otherwise than by devise or succession, (reckoning executors and administrators only as the single persons they represent):" Held,

ACTION for the infringement of patents, by the defendant's causing to be made a machine for the making of paper.

The first count of the declaration stated, that before the bankruptcy, to wit, on the 20th of April 1801, his Majesty, by his letters patent (of which *profert* was made) reciting that John Gamble was in possession of a machine for making paper in single sheets, without joinings, from one to twelve feet wide, and from one to forty-five feet long, the method of making which machine had been communicated to him by a certain foreigner, and that the same would be of great utility, granted to John Gamble the exclusive sale of the machine for fourteen years. It then stated the terms of the patent, and proceeded to aver, that, in pursuance of the patent, John Gamble enrolled the specification within six calendar months. It then proceeded to state another patent granted to John

that if one of the persons becomes bankrupt, the right passes to his assignees; and that though there are more than five creditors, yet the assignees do not hold it in trust for "more than five persons, otherwise than by devise or succession," within the meaning of the act.

It being objected, that a specification, enrolled pursuant to a patent for an invention, contained French terms:—Held, that an inventor of a machine is not tied down to make such a specification, *as, by words only*, would enable a skilful mechanic to make the machine, but he is allowed to call in aid the drawings that he may annex to the specification; and if by a comparison of the words and the drawings, the one will explain the other sufficiently to enable a skilful mechanic to perform the work, such a specification is sufficient.

You cannot ask a witness what the opposite party has said as to the contents of deeds executed by him, without such party has had notice to produce such deeds.

If a servant, while in the employ of his master, makes an invention, that invention belongs to the servant and not to the master: but, *semble*, that if the master employs a skilful person *for the express purpose* of inventing, that the inventions made by him will so much belong to the master, as to enable him to take out a patent for them.

If a patent be taken out by a British subject, on a secret trust, to hold it for the benefit of the real inventor, the patent stating that the patentee has obtained the invention from a certain foreigner; whether, if such inventor, for whom it is held, be an alien enemy at the time, that will annul the patent, without its being necessary to sue out a *scire facias* for its repeal.—*Quære.*

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Gamble on the 7th of June, 1803, (of which *profert* was also made) for certain improvements in the machine, and averred an enrolment of a specification by John Gamble, in pursuance of this patent. It then stated, that by indenture of 7th January, 1804, John Gamble assigned his interest in the patents to the bankrupts; and that in the year 1807, in consequence of the bankrupts and John Gamble having been at great expense in improving the machine, and in making models, by an act of Parliament of the 47th year of his late Majesty (Geo. 3), it was enacted, that the sole right of making, using, and vending these machines, should be in Gamble and the bankrupts for a term of fifteen years next ensuing; but that if the bankrupts or Gamble did not, within six calendar months after the passing of the act, enrol a specification of the last improvements in the Chanceries of England, Scotland, and Ireland, that the act, and the extended term granted by it, should cease. It then proceeded to aver such enrolment accordingly; and went on to state, that by an indenture of the 19th of February, 1804, Gamble conveyed all right and interest which he derived under the act of Parliament to the bankrupts. The count went on to state the petitioning creditor's debt, trading and act of bankruptcy of Messrs. Foudrinier, the suing out of the commission, the declaring them bankrupts, and the different assignments, to shew title in the plaintiffs, as assignees, and that the defendant contriving, &c. to injure the plaintiffs, as assignees as aforesaid, within the said term of fifteen years, to wit, on, &c. and on divers other days, &c. without the licence of the plaintiffs, or either of them, and against their will, made and used a certain machine for making paper, in imitation of the said improved machine therein before mentioned, in breach of the said act of Parliament, and against the privilege of the said Henry Foudrinier, and Sealy Foudrinier, and John Gamble, so assigned to the plaintiffs, as aforesaid, &c.

The second count charged the defendant with causing a

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machine for the making of paper to be made in imitation of the said improved machine.—The third count was similar, but charged the defendant's machine to be "in part imitation of the invention."—The fourth count charged it to be "in imitation."—The fifth count charged it to be "on the same principle and greatly resembling."—The sixth count charged it to be "greatly resembling."—The seventh and five following counts were similar to the preceding six, except that they stated the plaintiffs' right to be derived from the act of Parliament and the assignment from Gamble to the bankrupts, and omitted to refer to the patents.—The thirteenth count charged the defendant with the "using a machine for making paper in imitation of the improved machine."—The fourteenth count was for "using a machine in part imitation, and greatly resembling," &c.—The fifteenth count was for using a machine "in imitation and greatly resembling," &c. Plea—General issue.

On the part of the plaintiffs, the two patents were produced; one dated 20th April, 1801, and the other 7th June, 1803, and the specifications thereon duly enrolled; and a private act of Parliament (which was to be deemed a public act) of 47 Geo. 3, Sess. 2, c. 131, which recited the different patents and specifications, and the assignments of the patents, and that Gamble and the bankrupts had been put to great expense, and had made further improvements; and proceeded to enact, (§ 1), that Messrs. Foudrinier and Gamble, and their assigns, should, for fifteen years from thenceforth, make and use the improved machine, and that no other person should "make, use, or vend the said improved machine, nor in any wise counterfeit, imitate, or resemble the same, without the licence of the said H. and S. Foudrinier and John Gamble," or their executors, administrators, or assigns, in writing, under their hands and seals, first had and obtained, under the penalties that can be inflicted for contempt of this act, and further to be answerable in damages to Henry

and Sealy Foudrinier and John Gamble, their executors, &c. The act then proceeds to fix rates of charge at which licences shall be granted; and by § 5 it is enacted, that they, or one of them, shall, within six calendar months, enrol specifications of the present improved state of the machine in the Chanceries of England, Scotland, and Ireland, otherwise the advantages of the act to cease; and the party or parties executing the specification, may make use of such words, figures, delineations, and explanations, as are proper for well describing the invention, although they are not the same words, &c. as are used in the former specifications. Section 6, enacts, that all objection to the specifications shall be of the like force and effect as they would have been if this act had not passed, "*and if also the specifications to be enrolled as required by this act had been in due time enrolled instead of the said former specifications respectively*, except only as to the extension of the said privileges for the further term of years hereby granted." Section 7. Provided always, that if at any time during the term the said Henry Foudrinier, Sealy Foudrinier, and John Gamble, or any person who shall have or claim any right, title, or interest, in law or equity, in the said privilege, shall make any transfer or assignment of the privilege, or any shares of the benefits or profits, or shall declare any trusts to or for any number of persons exceeding the number of five, or if they shall open books for public subscriptions, or presume to act as a corporate body, or do any thing contrary to the statute 6 Geo. 1, c. 18, (commonly called the Bubble Act); "or in case the said power, privilege, or authority shall at any time become vested in, *or in trust for, more than five persons or their representatives*, at any one time, otherwise than by devise or succession, (reckoning executors and administrators as and for the single persons they represent, as to such interest as they are or shall be entitled to in right of such their testator or intestate,) that then, and in every of the said cases, all liberties and advantages whatsoever,

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hereby vested in the said Henry Foudrinier, Sealy Foudrinier, and John Gamble, their executors, administrators, and assigns, shall utterly cease, determine, and become void, any thing herein before contained to the contrary notwithstanding."—The specifications under this act were read. The formal proofs of the bankruptcy and of the plaintiffs' title being given, and it being also proved that there were more than twenty creditors of the estate of the bankrupts—

Scarlett objected, that by the assignees having the privilege in question assigned to them in trust for more than five persons, the whole thing was at an end, as by the 6th section of the act above cited, if the privilege became *vested in, or in trust for, more than five persons, otherwise than by devise or succession,*" the whole privilege was to be at an end. Now the property had become vested in the assignees in trust for more than twenty creditors; and this being a private act of Parliament, which is to be considered only in the light of a conveyance, the parties must take it with all its imperfections; and the only two cases in which the Legislature have allowed it to be held by or for more than five persons are pointed out, and this is not either of them: and unless the words "*otherwise than by devise or succession*" are to be considered as surplusage, the construction contended for must prevail. Besides, if the assignees had the right, they cannot carry on trade, their trust being to make a dividend of the bankrupt's estate: and could it be contended, that if there were one hundred creditors, each might by his own authority grant licences to paper-makers to use these machines?

ABBOTT, C. J.—The creditors could not do so, but the assignees might.

Brougham and *Alderson*, on the same side, cited the

case of *Hesse v. Stephenson*, 3 Bos. & Pul. 578, and adverted to the judgment of Lord ALVANLEY in that case.

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ABBOTT, C. J.—Whether Lord ALVANLEY entertained any doubt on this point I cannot tell; but I entertain none: and I am clearly of opinion that the privilege passes to the assignees.

Mr. Brunel, Mr. Bramah, and several other eminent engineers, proved that from the last specification under the act of Parliament, and the drawings annexed to it, any skilful mechanic might make the machine. In the first specification, they said, there was some little obscurity, and it had several Gallicisms in it: the French word *vice* for a screw; *vice de pression* for an adjusting screw; and in one part there was to be an acclivity of two *centimetres*; a *centimetre* being a hundredth part of the French *metre*, and $\cdot 3913$ parts of an English inch, the French *metre* being 39·13 inches English measure. All this would not be understood by English mechanics; but still, from the drawings annexed to either of the specifications, skilful mechanics could make the machine.

Mr. John Gamble proved that he obtained his knowledge of the original invention from M. Leger Didot, who was a Frenchman.

In cross-examination, *Scarlett* asked him—“Do you not know from Messrs. Foudrinier, that, by deeds passing between Didot and them, Didot retained some interest in the patent?”

ABBOTT, C. J.—I over-rule that question; for I hold that you cannot ask a witness what a plaintiff has said as to the contents of deeds executed by such plaintiff, without giving such plaintiff notice to produce the deeds, or accounting for their non-production.

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However, Mr. Gamble afterwards stated, that, at the taking out of the original patent in April, 1801, he was acting as a trustee for Didot; and that, at that time, this country was at war with France (it being just before the peace of Amiens).

Scarlett objected that the patent was void, being held in trust for an alien enemy.

ABBOTT, C. J.—I shall reserve that point.

The defence was, 1st, that the first specification was bad, on account of the Gallicisms contained in it, and of the obscurities in it; and, 2nd, that the improvements mentioned in the last specification were the invention of Mr. Donkin: and on the 2nd point, Mr. Donkin proved that those improvements were of his invention; but he stated, that at the time he invented those improvements he was employed by Messrs. Foudrinier and Gamble as an engineer, for the purpose of bringing the machine to perfection, and was paid by them for so doing, and therefore he was acting as their servant for the purpose of suggesting improvements in the machine.

The *Attorney-General*, in reply, contended that these were the patentees' inventions, and that Mr. Donkin was employed by them to carry their ideas into effect in the best manner.

ABBOTT, C. J.—An inventor of a machine is not tied down to make such a specification, as, by words only, would enable a skilful mechanic to make the machine, but he is to be allowed to call in aid the drawings which he annexes to the specification; and if, by a comparison of the words and the drawings, the one will explain the other sufficiently to enable a skilful mechanic to perform the

work, such a specification is sufficient. His Lordship then left it to the jury to say, whether it was an useful invention, and whether the defendant had infringed the patent by using the machine. His Lordship also observed, that by the 6th section of the act, the third specification was to be taken as a substitute for the former specifications, and if good (which it was), that would all defects and omissions in the former ones.

Verdict for the plaintiffs, with liberty to move to enter a nonsuit.

The *Attorney-General, Marryat, Gurney, Curwood, and Tindal*, for the plaintiffs.

Scarlett, Brougham, and Alderson, for the defendant.

[Attornies—*Elison & Bloxam* and *Swaine & Co.*]

BEFORE ABBOTT, C.J., BAYLEY, HOLROYD, & LITLEDALE, JS.

In Bank.

Scarlett now moved for a nonsuit or a new trial. He stated his first ground to be, that Gamble took out the first patent for Leger Didot, who was at that time an alien enemy, and that fact not being disclosed at the time of the taking out of the patent, it was a fraud on the Crown.

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ABBOTT, C. J.—We all think this a point worthy of consideration.

Scarlett.—The second point is, that this privilege could not be assigned for the benefit of more than five persons, under the seventh section of the private act of Parliament.

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BAYLEY, J.—Does not the act state that the right shall not be vested in more than five persons or their representatives?

Scarlett.—Yes, my Lord; and that it shall not be held in trust for more than five persons. Now the assignees are trustees for the whole body of creditors, and in many respects the assignees do not represent the bankrupt: and the act goes on to add, “otherwise than by devise or *suocession*,” and if, under these words, the right passed to the assignees, it would be a great question, whether the assignees could carry on a trade for the benefit of a large body of creditors. The only case on this subject is *Hesse v. Stephenson*.

ABBOTT, C. J.—What do you understand by the words, “or *suocession*?”

Scarlett.—Upon the rule *noscitur a sociis*, and being taken with the words “devise” and “executors and administrators,” it must be taken to mean coming in as an administrator by succession, in contradistinction from coming in by devise as executor.

ABBOTT, C. J.—Looking at the words of the private act, and the reference to the 6th Geo. 1, and construing the whole of the objects of the Legislature together, I am of opinion that this clause only applies to such assignments as are the act of the party, and does not apply to assignments by act of law. Under the Registry Acts, assignments are to be notified in a particular way; and the words of those acts are as clear as they possibly can be, but it was never thought that they extended to the assignees of a bankrupt.

BAYLEY, J.—This right may go to five persons or their representatives. It was in Messrs. Foudrinier, who were

under the limited number five, and it passed by a statutory assignment to the assignees, who are their representatives.

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HOLROYD, J. — I think that the assignees are the representatives of the bankrupts, and that they may sell the right for the benefit of the estate.

LITTLEDALE, J. — I am of the same opinion.

Scarlett. — Another thing to be observed is, that the first patent was for a machine to make paper from one to twelve feet wide; now it appeared from the evidence, that, without considerable alterations, the same identical machine could not make paper of both those widths, and therefore that patent fails, as the machine will not perform what it professed to do, and if the first patent fails, I contend the whole case fails with it. Another head of objection is, that four out of five of the improvements mentioned in the second specification, were invented by Mr. Donkin. For the plaintiffs it was contended that he was paid to improve the machine, and therefore, for that purpose, he was acting as the servant of Messrs. Foudrinier; but if that were so, he was not at all the servant of Gamble, and yet Gamble was one of the persons who took out the patent for those very improvements. But I further contend, that if a servant makes an invention, such invention is the property of the servant, and not of the master; but I admit that if the master plans, and the servant only executes what his master has planned, the invention belongs to the master. In the case of *Barber v. Walduck*, tried at Lancaster in the summer of 1823, before Mr. Justice HOLROYD, which was an action for the infringement of a patent, for an improved manner of making hats, the plaintiffs were hat manufacturers, and the plaintiffs' Counsel opened a strong case; but his first witness, who was one of the plaintiffs' men, proving that he invented the

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improvement, which was the subject of the patent, while employed in the workshop of the plaintiffs; the learned Judge directed a nonsuit.

BAYLEY, J.—Was that person employed by them for the express purpose of devising improvements?

Scarlett.—I believe not, my Lord: but, at any rate, Mr. Donkin was not acting as the servant of Gamble, who is one of the patentees, but of the Foudriniers only; and, besides this, the fifth supposed improvement, which was not of Mr. Donkin's invention, is proved to be no improvement at all; and if one of several improvements, for which a patent is taken out, is useless, the whole patent fails.

ABBOTT, C. J.—My present doubt is, whether, by the latter part of the sixth section of the private act, the defects (if any) of the earlier specifications are not aided.

BAYLEY, J.—In the case of *Hill v. Thompson*, 8 Taunt. 395, it is laid down, that if a servant make an improvement, his master is not entitled to take out a patent for it.

Scarlett.—I have further to object, that the first specification is bad, because there are several words in it not English; such as *vice de pression*, *vice de repulsion*, and *vice de reaction*, for different screws; and the French word *chapitre* for a cap also occurred: it was however proved, that, from the drawings annexed to this specification, a skilful mechanic might make the machine, but I submit that, as a specification could not be made by drawings alone, it must be made in apt words, intelligible to mechanics; and if this specification were held good, every thing mentioned in a specification might be called by a wrong name, and drawings referred to for the whole. Even the scale appended to the drawings was a scale of *pieds* and *pouces*, terms unknown to English mechanics.

ABBOTT, C. J.—But it was proved that the names to the scale were quite immaterial; for relative proportion, which was all that was wanted, the scale would have been as good if there had been no names at all.

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Scarlett.—If any part of the specification is bad the whole is so.

ABBOTT, C. J. said that some of the points deserved serious consideration; and—

The Court granted a rule *nisi* for a nonsuit or a new trial.

The National Bank of St. Charles v. DE BERNALES.

Jan. 19th.

ASSUMPSIT, on a bill of exchange, and for money had and received.

A corporation in a foreign country may sue as such in the Courts of this country, but they must prove that they are incorporated in that country; and

The plaintiffs were the National Bank of St. Charles, in the kingdom of Spain, and now sued in their corporate capacity (a). Letters of the defendant were put in and read, in which he admitted that he held in his hands a sum of 19,000*l.* the property of this bank.

same which sues.

it will be left to the jury to say, whether the body so incorporated is the

(a) In the case of *The Dutch West India Company v. Van Moses*, 1 Str. 613, it was held, that a corporation in a foreign country might sue in our Courts by their corporate name: the jury finding that the company suing were the same company that lent the money sued for in that case. The action was brought in the Court of Common Pleas, and the judgment of that Court is reported

by Sir John Strange, but it was afterwards removed by writ of error into the King's Bench, and ultimately to the House of Lords; and in each Court the decision of the Court of Common Pleas was affirmed, that a foreign corporation could sue as such in this country, 2 Ld. Raym. 1532; and in that report it is stated, *ex relat.* Lord Chancellor KING, (who had tried the cause), that at the

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A witness produced a copy of the charter of the King of Spain incorporating this bank. The witness stated, that he procured this copy from the office of the Council of Castile, which is the proper place for charters of this kind to be kept, and that he examined this copy with the original charter.—A translation of the charter was proved and put in.

The *Attorney-General* objected, that the plaintiffs declared as the National Bank of St. Charles, whereas the King of Spain, by his charter, gives them the name of the Bank of St. Charles. If this were an English corporation, they could only sue by their corporate name given them by their charter, and which name they had no power to alter.

Scarlett, contra.—The learned *Attorney-General's* statement is not quite accurate; as the King of Spain appoints this bank to be a national bank, and afterwards calls them The “National Bank of St. Charles;” and if they had misnamed themselves, it could be only taken advantage of on plea in abatement, as was held in the case of *The Corporation of Stafford*, in the notes to the case of *Mellor v. Spegh tman*, 1 Paties. Saund. 340 (b);

trial he held the company to prove, by proper evidence, that they were an authorised company in their own country. In the present case I have stated the evidence that was adduced on this subject.

(b) The case of *The Mayor and Burgesses of Stafford v. Bolton*, is reported in 1 Bos. & Pul. 40; it was an action for tolls, and the plaintiffs sued as a body, incorporated by the name of “*The Mayor and Burgesses of the Borough of Stafford*,” but at the trial they

put in a charter of 12 Jac. 1, which incorporated them by the name of “*The Mayor and Burgesses of the Borough of Stafford in the County of Stafford*,” and the Court held, that this misnomer could only be taken advantage of by plea in abatement.—In Bro. Abr. tit. *Misnomer*, 73, it is laid down, “En action per corpora- — tion ou natural corps *misnomer de* — l'un ou l'autre ne va mes al brief, — mes adire que nul tiel person in rerum natura, ou nul tiel corp politique, ceo est in barre car si

and besides this, the defendant in his own letters addresses them as the National Bank of St. Charles.

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ABBOTT, C.J.—I will ask the jury whether this is the same bank that was incorporated by the King of Spain.

The jury answered this question in the affirmative.

Verdict for the plaintiff.

Scarlett, Parke, and Kaye, for the plaintiffs.

Attorney-General, Koe, and Patieson, for the defendant.

[Attornies—*Freshfield & Kaye* and ———.]

soit misnosme il poit aver novel brief per le droit nosme; mes si ne soit tiel corps politique, ou tiel person donques il ne poit aver action.”—And in the Year Book, 22 Edw. 4, 34, which was an assize by the “*Master and Brethren of the Fraternity of the Nine*

Orders of Angels,” in Bransford in the county of Middlesex, it was pleaded in abatement that they were incorporated by the name of the *Master and Brethren of the Fraternity of All Saints and the Nine Orders of Angels*, and the assize was abated.

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COURT OF COMMON PLEAS.

Second Sitzings in London in Mich. Term, 1824.

BEFORE LORD CHIEF JUSTICE BEST.

Nov. 18th.

ELBOURN v. UPJOHN.

If the declaration in an action to recover the price of goods sent for sale on commission allege that the defendant sold but did not account to the plaintiff, the plaintiff must prove that a sale actually took place; and it will not be presumed even at a distance of twelve months after the delivery of the goods.

THIS case was opened as an action for goods sold, and money had and received.—It was to recover the value of some turkies sent by the plaintiff to the defendant.

Witnesses were called, who proved the delivery of the turkies to the defendant; but, on their cross-examination, it appeared that the plaintiff was a breeder of turkies, and sent them to the defendant, who was a poulterer, for the purpose of their being sold on commission.

Wilde, Serjt. for the defendant, upon this went for a nonsuit, contending that there was clearly no case of goods sold.

Vaughan, Serjt. for the plaintiff, replied, that there was no ground of nonsuit, because there was a special count in the declaration, charging the defendant with not having accounted, which he ought to have done.

BEST, C. J.—Although this count was not originally opened, I will allow you to go into the question upon it.

This count was then read. It stated, that, in consideration that the plaintiff would deliver to the defendant the goods in question, the defendant promised to sell them for him and account to him, and that, *although he*

afterwards sold them, he had not rendered to the plaintiff a just and true account of the sale.

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BEST, C. J., upon this, held that evidence must be given of the defendant's having actually sold.

Vaughan, Serjt. and *E. Lawes*, argued, that, at such a distance of time (it being nearly twelve months since the delivery), a sale ought to be presumed, and the value of the turkies considered as money had and received by the defendant to the use of the plaintiff, unless the defendant could shew that he had not sold, which it would be much easier for him to do than for the plaintiff to shew that he had.

BEST, C. J.—I think on the part of the plaintiff you must give some evidence of the sale. You perhaps need not have tied yourself down by such an averment as this, but, having done so, you are bound to prove it.

The plaintiff was then nonsuited.

Vaughan, Serjt. and *E. Lawes*, for the plaintiff.

Wilde, Serjt. and *Comyn*, for the defendant.

[Attornies—*Ewington* and *Forster*.]

In the same Term, *Vaughan*, Serjt. moved for a new trial, but the Court refused his application.

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Adjourned Sittings after Mich. Term, at Westminster.

BEFORE LORD CHIEF JUSTICE BEST.

STEED v. HENLEY.

Dec. 2nd.

An apothecary who furnishes medicines, and brings an action for the price of them, not being in a capacity to recover under the 55th Geo. 3, c. 194, cannot recover even for the phials in which the medicines were contained.

ACTION on an apothecary's bill.

Proof was given of the furnishing of the medicines for which the claim was made, and a witness was called to shew that the plaintiff had acted as an apothecary previous to the 15th August, 1815, to entitle him to recover under the statute 55 Geo. 3, c. 194, § 21; but this witness only proved the sending four bottles of medicine to his wife, and some attendances "in a friendly way" upon his son, for neither of which was any payment made, and this was all the practice proved before the 15th August, 1815. The witness also admitted that there were at that time no drugs upon the plaintiff's premises, but only some cupping and other instruments.—A certificate from the College of Surgeons, proving that the plaintiff had passed his examinations there, was put in.

Wilde, Serjt., for the defendant, contended that none of the proof adduced gave the plaintiff any character in which he might recover.

BEST, C. J., was of the same opinion.

Pell, Serjt., for the plaintiff, then contended, that, at least, he was entitled to recover for the phials in which the medicine had been sent.

BEST, C. J.—I am clearly of opinion that the plaintiff

is not entitled to recover even for the phials. Without the assistance of the act of Parliament, I should be of opinion that, as he acted illegally in practising, and the phials were delivered in the course of such illegal practice, he cannot recover for them. For I take it to be clear, as a general principle, that, where the law directs a man not to do a thing, and he, notwithstanding, does it, he cannot recover for any thing that takes place in the course of his doing it. But in this case, in addition to the general principle, there are the words of the statute clearly decisive against such claim, for the terms used are, that the party shall not recover "any charges."

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Nonsuit.

Pell, Serjt., and *Adolphus*, for the plaintiff.

Wilde, Serjt. for the defendant.

[Attornies—*E. Jones* and *Sherwin*.]

See the cases of *Brown v. Robinson*, ante, 264; *Walmisley v. Abbot*, ante, 309; and the notes to the latter case.

WALLACE v. WOODGATE.

Dec. 2nd.

TROVER for two horses. Plea—Not guilty.

The plaintiff was stated to be an officer in the army; the defendant was a livery-stable keeper. The defendant sold two horses to the plaintiff, who gave him bills of exchange for the price. Before the bills were due, the defendant, having a suspicion that they were not likely to be honored, went to the plaintiff and asked him to take

stable-keeper has a right to get possession of them, and for so doing he will not be answerable in trover; for the lien is not put an end to by the parting with the possession under such circumstances.

A stable keeper, by special agreement, may acquire a lien on horses for their keep; and if the owner, to defeat such lien, gets them away by fraud, the

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them back, and give up his property in the horses. They were then at livery in the defendant's stables, and a bill of charges had been made out for their keep. The plaintiff objected to the defendant's proposition. The defendant afterwards saw the plaintiff again, who, in the course of conversation, said, that the horses should not be taken away "*till they were paid for.*" However, after this, he sent his servant to the stables to fetch them, on the pretence that he wanted to take a ride, and would send them back at night. But he did not return them; and the defendant, finding they were gone, went after them, and having discovered them, told the person at whose stables they were, that he had been swindled out of them, and he was allowed to take them away. This was the conversion complained of.

Taddy, Serjt., for the defendant, admitted that a stable keeper could not, in general, like an innkeeper, detain horses for their keep; but he contended that the evidence in this case shewed a special agreement which created a *lien*, and the plaintiff having, to defeat such *lien*, obtained fraudulent possession of the horses, the defendant had a right to re-possess himself of them.

Vaughan, Serjt., for the plaintiff, replied, that whenever the possession was parted with, no matter under what circumstances, the *lien* was at an end, and could not afterwards be relied on to justify any subsequent seizure. He argued, also, that the plaintiff's saying he would not take away the horses till they were paid for, meant that he would not remove them till the price of their purchase was paid, and not the bill for their keep.

BEST, C. J., left it to the jury to say, whether the plaintiff, by his statement, meant to give the defendant a *lien* on the horses for their keep, and whether, if he did so, he fraudulently took them away in order to destroy that *lien*; stating it to be his opinion, that, under those circumstances,

the defendant had a right to re-possess himself of them, and would be entitled to their verdict in his favour.

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The jury found for the defendant.

Vaughan, Serjt., and *Steer*, for the plaintiff.

Taddy, Serjt., for the defendant.

[Attornies—*C. Lewis* and *Harmer*.]

MASH v. SMITH and Others.

Dec. 4th.

TRESPASS against three defendants.

One of them, named Mead, had suffered judgment to go by default.—He was called by *Vaughan*, Serjt., as a witness for his co-defendants.

Pell, Serjt., objected. He stands as one of the defendants, and is not a competent witness. The circumstance of letting judgment go by default does not put him in a different situation.

Vaughan, Serjt.—If the verdict passes for my clients who have pleaded, how can the party I call as a witness be benefited by it? it is no release of costs—no ground in arrest of judgment. And he cited *Ward v. Haydon*, 2 Esp. 552 (a), and *Chapman v. Graves* (b), mentioned in a note to *Stevens v. Lynch*, 2 Camp. 333.

A defendant in trespass, who has suffered judgment to go by default, is not a competent witness for other defendants in the same action who have pleaded, if the jury have to assess the damages against him, as well as to try the issue as to the other defendants.

(a) In the case of *Ward v. Haydon*, it was ruled, that where one defendant in a joint action has let judgment go by default, and the other has pleaded, the defendant who has suffered judgment by de-

fault is a competent witness for the other defendant who has pleaded. That was an action of trover for the carriage part of a chaise, tried before Lord KENYON.

(b) It is said in the case of *Chap-*

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 v.
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BEST, C. J.—The jury are brought here to-day to do two things—to try the issues joined and to assess the damages. Now, if this man's evidence is admitted to give a complexion to the case, it may go to reduce the damages against him, and therefore I am of opinion that he is clearly interested and ought not to be received. But as my Lord KENYON and Mr. J. LE BLANC seem to have taken a different view of the subject, I think it will be best to receive the witness, and give leave for a motion to the Court upon the point, if the result of the case should make it material.

Pell, Serjt., and Chitty, for the plaintiff.

Vaughan, Serjt., and Burton, for the defendants.

[Attornies—*Gray and Kirkman & R.*]

man v. Graves, (which was tried before LE BLANC, J.) that, "In an action of trespass, a co-trespasser not sued is a competent witness for the plaintiff; but if one of se-

veral defendants allow judgment to go by default, he is not a competent witness for the plaintiff, *although he is for his co-defendants.*"

Dec. 6th.

BURNAND and Another *v.* NEROT.

That part of the statute of frauds, which directs certain agreements to be in writing, will be taken

notice of by the Court, in the trial of an issue out of the Court of Chancery; however, if the jury should think that there was an agreement made, which was not in writing, the Judge will indorse that finding on the *postea*, as special matter.

Office copies are not evidence on the trial of such an issue, though they were used in the Court of Equity.

IN this case two issues directed by the Vice Chancellor were to be tried. The one was—Whether in the year 1804, there was any agreement between the defendant and his sister, Mrs. Burnand, then Miss Nerot, for the sale

by him to her of his share and interest in the lease or term of years, good-will, household furniture, plate, linen, and china, in a house in King-street called Nerot's Hotel?—The other issue was—Whether there was any agreement by which the defendant was to have a certain portion of cash, and his sister a certain quantity of wine and coals which were on the premises? The Vice Chancellor had ordered that the parties should be both examined at the trial of the issues; and the case for the plaintiff depended chiefly on the evidence of Mrs. Burnand, as that of the defendant did materially upon his own. A valuation of the lease, good-will, &c. was made between her and her brother, which she stated was previous to her purchasing, but which he explained as being merely made to ascertain what the property at the hotel was worth previous to his quitting England.

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Pell, Serjt., for the defence, contended that the statute of frauds applied to this case, there being no agreement in writing. He also went to the credit of Mrs. Burnand, and called several witnesses to contradict her. He also proposed, for the same purpose, to read *an office copy* of her answer in Chancery, which office copy was used in the Court of the Vice Chancellor.

BEST, C. J.—I am afraid that is not evidence.

Pell, Serjt.—I will tell your Lordship why I think it is. I grant that in ordinary cases an *examined* copy is necessary; but I take the distinction to be this,—an *office copy* is evidence in the same cause, between the same parties, in the same Court. Now this is clearly the same cause, and between the same parties, and I submit, also, that it is in the same Court, as, notwithstanding the dignity of this Court in general, it is, *pro hac vice*, only a tribunal assisting the Vice Chancellor in the determination of a particular question, by telling him the opinion

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of a jury upon it, under the direction of a Common Law Judge.

Vaughan, Serjt., intimated that, inasmuch as before the Vice Chancellor it might subject him to a motion for a new trial, on the part of the plaintiff he thought it would be best for him to waive his right to object.

BEST, C. J. — If the objection is not waived, I am bound to say, that I cannot get over it. They must go a great deal further. To affect the witness, they must prove the identity of the party who makes the answer, which they cannot do by merely putting in the office copy. I have been looking into the subject, and I can find no exception to the general rule, that an *examined* copy must be put in. I cannot agree that one of his Majesty's supreme Courts is to be considered as merely an auxiliary to the Court of the Vice Chancellor.

The objection was then formally waived, and the answer was read; and several witnesses were called, who contradicted Mrs. Burnand's testimony.

Vaughan, Serjt., in reply, observed, that, as to the point raised on the statute of frauds, the Vice Chancellor merely sent the issues to the Court of Common Pleas, for information as to the matter of fact, whether the parties intended the one to transfer and the other to take the interest in the premises, &c. in question. The statute, therefore, did not apply.

BEST, C. J. — I am bound, sitting in a Court of Law, to take notice of the statute of frauds. I am aware that in the Court of Chancery a different rule prevails. The Court of Chancery is bound by the statute of frauds thus far:—The party may make the objection, but I believe if he does not, but answers to the bill, the Court will say,

you have not put yourself on the statute, and cannot, therefore, avail yourself of it. The statute mentions an agreement for a lease; and it has been decided that if one part of an agreement is void as within the statute, an auxiliary agreement is void too. Therefore, I think, in this case, the verdict should be for the defendant at all events. But if the jury should be of opinion that Mrs. Burnand is entitled to credit, then they may find that there was an agreement, though not reduced into writing, and that, as special matter, may be indorsed on the *postea*. —His Lordship made no remark as to the effect of the valuation.

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The verdict was for the defendant on both issues.

Vaughan, Serjt., and *C. Cresswell*, for the plaintiffs.

Pell, Serjt., *F. Pollock*, and *Barber*, for the defendant.

[Attornies—*Flexney* and *Stevens*.]

In the Court of Chancery it is the constant practice to read *office copies* of Chancery proceedings in evidence, without their having been examined by the witness who produces them. On trials at Law, *office* copies are never admitted in evidence, *examined* copies only being allowed; and on

issues, the practice is to try them precisely in the same way as any other trial at Law, except in such particulars as are specially directed by the Equity Judge in his order directing the issue, such as for a party to be examined, or the like.

1894.

Dec. 7th.

SINCLAIR v. STEVENSON.

If there are parol negotiations, which are afterwards reduced into writing, the writing must be looked to as shewing the final arrangement. But when a question arises as to whether a transaction has an usurious character, questions may be put to ascertain whether other matters, which do not appear on the face of it, were not previously talked of.

If a paper be put into the hands of a witness to refresh his memory, the Counsel on the opposite side have a right to see it; but if it is merely given to him to prove a handwriting to it, they have not.

If a creditor of a bankrupt agrees to release the estate,

on an undertaking by one of the assignees to pay him what should appear to be justly due, he is a competent witness on the part of the assignees.

If a paper be traced to the hands of the agent of a party in a suit, and notice has been given to such party to produce it, he is bound to do so, and the other side are not bound to call the agent. And if he has delivered it to the stamp-office to get certain duties allowed, and does not tell the party serving the notice to produce, of that circumstance, parol evidence of the contents may be given.

TROVER, by the assignee of a bankrupt, to recover possession of a distillery plant, which, it was alleged, was either the property of the bankrupt by purchase, or in his apparent order and disposition at the time of his act of bankruptcy.

It was opened that a question would arise as to whether an instrument, which appeared to have been prepared in consequence of certain negotiations in the form of a lease, did not, in reality, evidence a purchase to be paid for by instalments, with usurious interest.

The bankrupt was examined; and was asked by *Pell*, Serjt. as to some negotiations about the plant in question. It appeared that they were at first verbal, but were afterwards reduced into writing.

BEST, C. J., upon this observed—It has been decided lately, that if there are negotiations, which, at first, are merely parol, but are afterwards reduced into writing, we must look to the writing as shewing the final arrangement. But, in such a case as this, I will allow questions afterwards to be put, to ascertain whether other matters were not previously mentioned, besides those which were eventually reduced into writing.

A paper was about to be put into the hands of another witness, to enable him to explain some part of his evidence, when—

Pell, Serjt. asked to see it.

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Vaughan, Serjt., contended that he had no right to see it, unless it should be put in evidence.

BEST, C. J.—If you put a paper into the hands of a witness in order to refresh his memory, the other side have a right to see it: if you merely give it him to prove a handwriting, they have not such right.

The same witness afterwards appeared to be a creditor of the bankrupt: he was therefore objected to. But upon being asked, whether he would release the estate, on the plaintiff Sinclair, one of the assignees, undertaking to pay him what should appear to be justly due to him, he replied in the affirmative.—A release was then prepared, by which the witness, in consideration of a promise by Sinclair to pay him what should be found justly due, released all claims on the estate, and Sinclair, in consideration of such release, made the promise required.

Vaughan, Serjt., objected. It must be an absolute release, not one, as this is, containing a fresh cause of action.

BEST, C. J.—If the witness will take it, I shall receive him.

Wilde, Serjt.—This will not be sufficient; the assignee will have a claim on the estate for this money, and the witness comes to increase, by his evidence, the funds out of which the assignee is to receive it. A promise from a plaintiff to pay a debt never was held sufficient if the debt was still in existence. The witness is not sufficiently removed from all the security of the fund to make him competent.

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BEST, C. J.—He is a witness. By the claim of the assignee on the fund his interest is not affected. The assignee must pay the money whether he gets it again from the estate or not. The witness gives up his claim to the estate and looks only to the assignee, and that is quite sufficient.

An engrossment of a deed, which was not executed, was proved to have been produced by one Smallwood, who was the defendant's agent, at a meeting between him and the bankrupt, and to have been left, after it had been read, in the hands of Smallwood.

Pell, Serjt., called for its production, notice to produce having been given to the defendant's attorney.

Vaughan, Serjt., said that he had it not.

Pell, Serjt., was then proceeding to give parol evidence of its contents, when

Wilde, Serjt. objected. We have two answers to the call for the production of the deed: the first is, that we have not got it, and the next is, that Smallwood may be called to produce it.

BEST, C. J.—Smallwood is your agent.

Wilde, Serjt.—But notice has only been given to the principal, and that will not do; they must shew that it got out of the hands of the agent. I will adduce evidence to shew that we have it not in our custody.

BEST, C. J.—Unless you do give such evidence, I am of opinion that you must produce it. If the deed is traced to your agent that is enough. They need not call Small-

wood. But if you account for its not being in his custody that may vary it.

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A witness proved that the engrossment was, in the usual course of their business, delivered to the law stationers, in the month of December or January, to get the stamps on it allowed at the stamp-office, because it had not been executed.

BEST, C. J. — Then it is in the control of the defendant?

The witness was then asked, but could not say, what is done with any instrument after it goes to the stamp-office to get the amount of the stamps returned.

Pell, Serjt. — It either is or is not in existence. If it is, they are the proper persons to get it back again; if it is not, we may give evidence of the contents. If it is in the custody of the stamp-office, there are no means of compelling the commissioners to produce it. These persons are the owners of the instrument.

Vaughan, Serjt. — There is no reason to presume that the officers of the Revenue will not produce the instrument, or, at least, shew what has been done with it, whether it is destroyed or not. In most offices there is a certain time during which papers are kept. This instrument, in the course of business, is naturally to be found at the stamp-office, and no inquiry has been made there for it. Possession is the very foundation of notice; and I allow that if there were reasonable evidence of possession on our part, and we did not produce the instrument, parol evidence might be given. But the evidence is quite the other way.

BEST, C. J. — The case is new, but I am of opinion, on the common sense of the thing, that when one party has notice

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to produce a particular instrument, and does not say that he has it not, but has delivered it to the stamp-office, the other party ought to be allowed to give parol evidence of the contents.

It subsequently appeared that the notice to produce had not been served in time, and the matter was disposed of on that ground.

Pell, Serjt., and F. Pollock, for the plaintiff.

Vaughan and Wilde, Serjts., for the defendant.

[Attornies.—*M'Dougall and Nettleship.*]

Adjourned Sittings after Mich. Term, at Guildhall.

BEFORE LORD CHIEF JUSTICE BEST.

Dec. 10th.

SEAMAN v. PRICE.

Proof that a conveyance was executed to a person named by the defendant, will support an averment in a declaration that he himself "became the purchaser."

ASSUMPSIT.

The declaration stated, that the plaintiff had bargained and agreed with one Emanuel for the purchase of certain freehold houses, and that the defendant was desirous of becoming the purchaser of them instead of the plaintiff; and, in consideration that the plaintiff would give up the bargain, and suffer the defendant to become the purchaser, the defendant agreed to pay the sum of 40*l.* It then alleged, that the plaintiff did give up the bargain, and permit and suffer the defendant to become, and the defendant did become, the purchaser, and obtained a conveyance.—From the evidence, it appeared that the contract was as

stated in the declaration, but the conveyance was not executed to the defendant himself, but to a Mrs. Price.

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Pell, Serjt., went for a nonsuit; contending, that this evidence did not support the declaration, as it was alleged that the defendant himself became the purchaser, whereas the evidence was of a conveyance executed, not to him, but to a Mrs. Price.

BEST, C. J.—I am of opinion that the declaration is supported. If Emanuel had refused to convey, the 40*l.* need not be paid; but he has conveyed, and although not to the defendant, yet to his nominee, and the defendant has had the benefit of the arrangement.

Verdict for the plaintiff.

Vaughan, Serjt., and *Talfourd*, for the plaintiff.

Pell, Serjt., and *Barstow*, for the defendant.

[Attornies—*Hudson* and *Greenfield*.]

DOWLING v. FINIGAN.

Dec. 11th.

USE and occupation.

On the part of the defendant, two witnesses were called to give evidence of a conversation between him and the plaintiff, which conversation they had both put down in writing. The first was asked by the defendant's Counsel to produce his memorandum, but he had not got it with

If, after a witness for the defendant has been examined as to a conversation which he put down in writing, and has not been asked to pro-

duce the memorandum, and the plaintiff's Counsel, in reply, has observed upon its absence, the Judge, for his own satisfaction, asks the witness for the paper, and it is produced, such production will not entitle the plaintiff's Counsel to address the jury again on it.

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him. The second was not asked any question as to whether he had his or not.

Wilde, Serjt., for the plaintiff, in reply, observed upon the absence of the papers, and after he had concluded his address—

BEST, C. J., called up the second witness, and asked if he had got his paper with him. The witness replied in the affirmative, and handed it up to his Lordship, who inspected and passed it to *Wilde*, Serjt., telling him that he should have it read or not, just as he thought proper.

Wilde, Serjt., replied that he had no wish upon the subject; but submitted that, as by the production of the paper the complexion of the case had been materially changed, he ought to be allowed to address the jury upon it as a fresh piece of evidence.

BEST, C. J.—Either party might have called for it; neither have thought proper to do so; and it is for the satisfying of the conscience of the Judge that it is asked for now. I never knew of any Counsel making a second speech on such an occasion.

Wilde, Serjt., I submit that it is the duty of a plaintiff's Counsel to observe upon all the evidence in the cause, through whatever means that evidence is introduced.

BEST, C. J.—I cannot allow it, I should be subverting the practice of the Court.

Verdict for the defendant.

Wilde, Serjt., and *Abraham*, for the plaintiff.

Pell, Serjt., and *E. Lawes*, for the defendant.

[Attornies—*Burnley & A. and West.*]

1824.

RUMBALL v. WRIGHT:

Dec. 14th.

ASSUMPSIT by Thomas Rumball, the Elder, to recover damages for the non-performance of an agreement, by which the plaintiff, and a person named Bellamy agreed to grant the defendant a lease for ninety-nine years, of certain premises, on which the defendant agreed, previously, to lay out the sum of 600*l.*, and afterwards, to put the premises in complete repair. There were special counts on the agreement, a count for use and occupation, and the common money counts.

The agreement purported to be made between the plaintiff and a person named Bellamy of the one part, and the defendant of the other part. It appeared from the signatures to have been executed by a person named Thwaites for Bellamy, by Thomas Rumball, the Younger, *for his sister*, (who, it appeared afterwards, had an annuity secured on the premises,) and by the defendant for himself. There did not appear to be any signature of the elder Rumball, the plaintiff, but the younger Rumball, who was called as a witness, stated that he signed it for *his father*. The special counts stated the agreement to be between the elder Rumball and the defendant.

Vaughan, Serjt., for a nonsuit.—Here is a direct variance between the declaration and the evidence. It was in consequence of the consideration passing from Rumball the Elder, that the defendant executed, and this Thomas Rumball has never signed it. There must be some reciprocity. What means have we of compelling Thomas Rumball the Elder to execute a lease? This is not the case of a deed poll, but an agreement, purporting to be between the parties. It appears from the instru-

not to the agreement, and that the statement of his having signed for the person was written by mistake.

In an action on an agreement for not accepting a lease, if it appear that there was a person who had an interest in the premises, and it be not proved at the trial that such person was a party to the lease tendered, the plaintiff cannot recover. Neither, under such circumstances, is he entitled to recover for use and occupation, though the defendant may have received rent from the under-tenants. And if an agreement purport, by the words attached to the signature of a particular person, to have been signed by that person on the behalf of another having an interest but not being a party, such person may be examined to prove that he signed in reality for a different person named as a party, and whose signature was first-mentioned

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ment itself that the plaintiff did not execute, and the evidence of the instrument cannot be contradicted by parol testimony.

Pell, Serjt., contra.—The first question is, Who are the parties? They are Rumball and Bellamy on the one side, and Wright on the other. Rumball is one of the granting parties. It is not necessary that he should execute the agreement. Suppose that Wright only had put his name, yet Rumball, the party having the interest, might bring his action on that agreement. Though Rumball did not sign it, yet if he and the defendant acted under that agreement, the defendant might claim the lease of him. With respect to the objection, that the signature to the agreement declares Rumball the Younger to have executed it for his sister, that declaration is altogether nugatory, for she is not made a party to it. It is said that this cannot be controverted by parol testimony. But the testimony is not offered as a contradiction. If there is any mistake or error it may be shewn. The parol testimony is only used for explanation.

BEST, C. J.—On the last ground I shall receive the evidence. I am clearly of opinion that it is necessary to shew that the elder Rumball executed the agreement, and I have doubts whether this has not been done. If the sister had signed for herself I would not have received parol testimony,

Evidence was afterwards given, to shew that Rumball the Elder had acted under the agreement.—The plaintiff also claimed rent for the use and occupation, and proved that the defendant had received rent from the under tenants of the premises. In the course of the case, it was proved that the defendant had laid out the 600*l.* required, and that the plaintiff had tendered a lease, which, because Miss Rumball was not made a party, the defendant's at-

torney advised him not to accept; and it appeared, from an abstract sent to the defendant's attorney, that Miss Rumball had an annuity secured on the premises.

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Wright.

Vaughan, Serjt., contended, that the plaintiff, under the circumstances, was not entitled to rent from the defendant: and cited the cases of *Kirtland v. Pounsett*, 2 Taunt. 145 (a), and *Hegan v. Johnson*, 2 Taunt. 148 (b).

Pell, Serjt., stated, that the doctrine of *Kirtland v. Pounsett* was controverted in a case mentioned in a note to the case of *Hearn and Another v. Tomlin*, Peake's N. P. C. 254 n. (c).

BEST, C. J.—This is a question of law, and I think the action cannot be maintained. With respect to young Mr. Rumball, I think the agency is sufficiently established by the father's acting under the agreement. I am of opinion that the defendant is entitled to a verdict, for the plaintiff has not shewn that he had authority to grant a lease; and if the objection had been made in time, I should have

(a) The case of *Kirtland v. Pounsett* decides, that if a purchaser, having paid the whole of the purchase-money, take possession of premises under a contract for a sale, which, on account of a defect in the vendor's title, fails to be completed, the vendor cannot afterwards recover rent for the period of the purchaser's possession, upon an implied contract for use and occupation.

for rent; for there is no demise express or implied. If a lease had been tendered to the occupier, and he had refused to execute it, he might have been turned out of possession without any notice to quit.

(c) The case referred to is that of *Hall v. Vaughan*, Exchequer, Mich. 59 Geo. 3, in which the Court declared their opinion to be, that the vendor might, in cases where the contract went off without fault on his part, and the occupation had been beneficial to the vendee, recover a compensation for such occupation.

(b) In *Hegan v. Johnson*, it was held, that if, under an agreement for a lease at a certain rent, the tenant is let into possession before a lease is executed, the lessor cannot, during the first year, distrain

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nonsuited the plaintiff. This is an action on an agreement, by which Rumball and Bellamy agree to grant a lease to Wright for ninety-nine years, and, as a consideration for it, Wright is to lay out 600*l.* previously, and afterwards to put the premises in complete repair. If he has laid out the 600*l.* he has done the utmost that can be required of him under the circumstances. There is no part of the contract in which the defendant agrees to pay rent; but the substance of it is this: We, the granting parties, will grant you a lease, in which lease you shall covenant to pay rent; and they further say, that they have power to grant the lease. The defendant only says, I will take the lease. It does not appear that a lease with the proper parties was ever offered to him; for it appears by the abstract sent to the defendant's attorney, that Miss Rumball had an interest in the premises, and she is not a party to the agreement, and could not be compelled to join in the lease; nor does it appear that she was made a party to the lease in the draft that was sent, for no evidence has been given on that subject. I think, therefore, that the plaintiff is not entitled, either in law or justice, to recover, for, without the concurrence of Miss Rumball he could not grant such a lease as any respectable attorney could approve on behalf of a client. The case in the Common Pleas (*d*) decided that a party let in as a purchaser was not liable for use and occupation: and this defendant is similar to a purchaser; he is not put in as a tenant, (and it is from the relation of landlord and tenant that the claim for use and occupation arises), but he is put in to occupy till a lease shall be granted, and when the lease is granted, then he is liable to rent, but not before. The doctrine of the case in the Court of Exchequer is reconcileable with this; for, there, it is laid down, that if a bargain goes off *through the fault of the tenant*, then a claim for rent may be made. But in this case it is not the fault of

(*d*) *Kirtland v. Pounsett*, 2 Taunt. 145.

the defendant. If the plaintiff has no title, the defendant may be called upon to pay the rents which he has received from the occupiers to other persons: and in this case there is another person, that is, the annuitant, who can come on the property for the payment of the annuity. I am decidedly of opinion that the defendant is entitled to a verdict.

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v.
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Verdict for the defendant.

Pell, Serjt., and *Comyn*, for the plaintiff.

Vaughan, Serjt., and *E. Lawes*, for the defendant.

[Attornies—*Thomson* and *West*.]

WOODLEY and Another v. BROWN and Another.

Dec. 16th.

TROVER for wheat.

For the plaintiffs, it was proved that they were corn-factors, and were applied to by a person named Loud to sell him some wheat, as he wanted to buy on speculation; that the plaintiffs agreed to sell, but said, that, as it was bought on speculation, it might as well remain under their care, and that they might as well have the commission on it as any one else. That Loud agreed to this; and that the plaintiffs, thereupon, called the defendants, and acquainted them with the bargain, and told them that they (the plaintiffs) were to land the wheat in their own names, and that they (the defendants) were not to know any one else in the transaction, but were to hold the wheat solely on their account.—The delivery orders, three in number,

If A. sells corn to B., who buys on speculation, and the corn is landed at the warehouse of C., (the granary-keeper of B.,) who is told that he is to hold it on the account of A., A. has a sufficient property in it to enable him to maintain trover against C.

A return made by A. in such case, under the stat. 1 & 2 Geo. 4,

c. 87, § 12, of such corn as sold and delivered to B., is not conclusive evidence against A. of an absolute unconditional sale and delivery so as to bar him of his right to recover it out of the hands of C.

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were put in and read. One of them contained the name of Loud, the other two the names of the defendants.

The clerk of the plaintiffs proved, that, at the time they were given to the defendants, all of them were made out in the name of Loud. He also proved, that, about three weeks after, he met one of the defendants, and having heard of the failure of a Mr. Loud, who was engaged in the Sittingbourne Bank, asked him if it was the Mr. Loud who had bought the wheat of the plaintiff, and he replied that it was not, and added, but, suppose it were, what difference can it make to you? we landed the wheat in your names in our books, and we hold it for you, and shall not deliver it to any order but your's.

A person from the corn-meters' office also proved that he inquired of Mr. Young (another of the defendants) if he was the buyer of the corn, and that Young replied, No, it was Woodley's, and Woodley landed it. The witness charged the metage to the plaintiffs, and received it.

The defendants were the granary-keepers of Loud, and it did not appear that they had been employed by the plaintiffs before the transaction in question.

Wilde, Serjt., for the defendants.—The question is, Whether the plaintiffs, who sold to Loud, procured the corn to be delivered to the defendants as the warehouse-keepers of Loud or of themselves? The delivery-order is made out to Loud. Suppose Loud or his assignees had brought an action, would it have been any answer to talk of the understanding at the time of the bargain? The phrase "*being under care*" does not mean *being in possession*, but merely denotes a request that the plaintiffs might be employed on the re-sale. The conduct of Loud, therefore, does not prove that he assented to the wheat's being kept in the *possession* of the plaintiffs. The practice spoken to by the plaintiffs' clerk is not the general practice of the corn market, but merely of the plaintiffs' house, and that only sometimes. The effect of this is—A party says, I will not trust you with the corn, but I

will give you the order to go and take it, and trust to your honor. What was to prevent Loud from taking it when he pleased? The statute 1 & 2 Geo. 4, c. 87, § 12, requires every corn-factor to make a weekly return of corn *sold and delivered*, and the plaintiffs, under this act, made a return of the corn in question, as corn sold and delivered to Loud (a). This is not an action on a special under-

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& Another.

(a) The statute 1 & 2 Geo. 4, c. 87, which was an act for regulating the importation and exportation of corn, enacts, § 11, "That every corn factor carrying on his trade or business in the city of London, or in the suburbs thereof, shall, within one month after this act shall have been in force, make a declaration in the form following; that is to say,

"I A. B. do hereby declare, 'that the returns of the quantities 'and prices of British corn, which 'henceforward shall be by or for 'me sold and delivered, shall, to 'the best of my knowledge and 'belief, contain the whole quantity, and no more, of the corn 'bonâ fide sold and delivered by 'or for me within the period to 'which they shall refer, with the 'prices of such corn and the names 'of the buyers respectively, and of 'the persons for whom such corn 'shall have been sold by me respectively, and to the best of my 'judgment conformable to the directions of an act passed in the 'second year of the reign of King 'George the Fourth, intituled '[here set forth the title of this 'act].'

"Which declaration shall be in writing, and shall be subscribed with the hand of such corn-factor, and shall be by him or his agent forthwith delivered to the Lord

Mayor of the city of London for the time being, who is hereby required to grant a certificate thereof, to be registered by the inspector of corn returns; and in case any person shall carry on the trade or business of a corn-factor, without making the said declaration, agreeably to the directions of this act, every such person shall forfeit and pay the sum of fifty pounds."

§ 12. "And be it further enacted, that every such corn factor shall, and he is hereby required to return or cause to be returned on the Wednesday in each and every week, to the said inspector of corn returns, an account in writing, signed with his own name or the name of his known agent, of the quantities of each respective sort of British corn so by him *sold and delivered* during the week, with the prices thereof, the amount of every parcel, with the total quantity and value of each sort of corn, and by what measure or weight the same was sold, with the names of the buyers thereof; and of the persons for whom such corn shall have been sold by him respectively, in default whereof every such corn-factor shall for every such neglect forfeit and pay the sum of ten pounds."

1824.
WOODLEY
& Another
v.
BROWN
& Another.

taking to hold for the plaintiffs, but it is founded on property. How is the property made out? The plaintiffs were never in possession of the wheat at all. The goods, while in the ship, are still as much in the possession of the owner as if they were in his own warehouse. There is only an order to sell, by which the factor acquires no property. Therefore, there is no conversion of the wheat of the plaintiffs.

BEST, C. J.—If the evidence for the plaintiffs is true, there was a delivery to them, for the defendants were their agents. If I deliver goods to a carrier, the carrier's possession is my possession, and if I demand them, and he refuses to deliver them, I may bring trover.

Wilde, Serjt.—There can be no conversion if the goods were in the plaintiffs' own possession.

BEST, C. J.—If I deliver to a man, I have a right of possession, and right of possession is all that is required in trover.

Wilde, Serjt., then went to the credit of the plaintiffs' witnesses, and called Loud, who contradicted the proof as to the arrangement that the defendants were to hold the corn for the plaintiffs, and stated, that all that was agreed on was, that the plaintiffs should have the re-sale. He also called the Inspector of Corn Returns, who produced a return made by the plaintiffs under the statute 1 & 2 Geo. 4, c. 87, in which return the corn in question was mentioned as having been sold and delivered to Loud, within the week commencing the 9th, and ending the 14th of August.

Vaughan, Serjt., in reply.—There is no dispute that Loud was the buyer; but the question is, whether the corn was not to remain for a stipulated time in the possession

of the plaintiffs, and whether the defendants did not, after the sale, acknowledge it to be the plaintiffs' property? There is no contradiction to this latter part. It is not necessary here to discuss the general principles of law, for this case depends upon a particular agreement. The circumstance of the alteration of the name in two of the delivery-orders, not being explained, raises a suspicion of unfairness in the transaction on the part of the defendants. If a man takes wheat and holds it as mine, and becomes as it were my servant, *against him* the property is complete, and he cannot turn round and contest my right to have it back again.

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& Another
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& Another.

BEST, C. J.—The credit of the witnesses is material here. No man can look at this case, as a moralist, and not say at once who is entitled to the verdict; for the defendants have paid nothing for the wheat, and yet they wish to set it off against a debt due to them from Loud. But, notwithstanding this moral title on the part of the plaintiffs, if there be any rule of law against their claim, of course that rule must prevail. It has been insisted on, that the plaintiffs have not a sufficient property to enable them to maintain this action; I am of opinion that they have a special property, which is quite sufficient, and therefore the question for consideration is, whether, before the delivery-notes, which are the symbols of possession, were parted with, an arrangement was made that the defendants should hold the corn on the behalf of the plaintiffs. If there was such an arrangement, the plaintiffs are entitled to recover. If a third person had obtained possession of the corn, the plaintiffs could not set up this arrangement against him, because he would properly say, you have parted with the delivery-notes and thereby encouraged me to purchase, and I have become a purchaser in consequence. But, if the plaintiffs' case is true, the defendants cannot make use of this kind of defence. The delivery to Loud was a conditional delivery. The

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WOODLEY
& Another
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BROWN
& Another.

return made under the statute referred to, has nothing to do with such a case as this. It goes to prove the delivery, and there is no doubt of the delivery. This brings it back to the real question, which is, was the corn delivered so that Loud had the entire control over it, or was there, before the delivery of the symbols of possession, a delivery of the corn to the defendants to hold on behalf of the plaintiffs? Unless the plaintiffs' witnesses are perjured, the plaintiffs are entitled to a verdict.—His Lordship then left it to the jury to say, whether, on the evidence, they believed that there was a delivery to the defendants to hold for the plaintiffs, for that, if there was such a delivery, the plaintiffs were entitled to a verdict.

Verdict for the plaintiffs.

Vaughan and *Pell*, Serjts., and *Ryland*, for the plaintiffs.

Wilde, Serjt., and *Selwyn*, for the defendants.

[Attornies—*B. Lewis* and *Stevens & Co.*]

In the ensuing Hilary Term, *Wilde*, Serjt., moved for a rule *nisi*, for a new trial, on two grounds; 1st, that there was no property in the plaintiffs to support the action: but on this point the Court were unanimously against him. The 2nd point was, that the return made under the statute of the 1st and 2nd Geo. 4, c. 87, § 12, of corn sold and delivered, was conclusive against the plaintiffs.

On this point the rule *nisi* was granted; and in the course of the same Term it came on to be argued.

Vaughan, Serjt., in shewing cause, was stopped by the

Court, and *Wilde*, Serjt. called on to support his rule.— He contended, that as the return required is of corn sold and delivered, and not of corn sold only, the corn-factor's undertaking is, that he will make a return of corn *bond fide* sold and delivered. The object of the act was to ascertain the sales, but the deliveries were also necessary to shew the correctness. The facts must be returned truly, at the peril of binding the interests of the party making such return. This act should be construed in the same way as the ship registry acts; and in *Mestaer v. Gillespie*, 11 Ves. Jun. 643, which was a case on the construction of those statutes, Sir WILLIAM GRANT says, their provisions compel parties to observe regulations not in any degree requisite for their own private interests, in order to accomplish the ends of the act. This return being required by an act of Parliament, the party cannot say—I kept the corn in my own hands. He has no right to speculate on the intention of the Legislature. He is to make a true and *bond fide* return of corn sold and delivered: this means to cut down all *constructive* deliveries, and it is to be considered a delivery under the act for every conceivable purpose. The object is, that the corn shall so pass from one hand to another, as that the price may indicate a fair transaction. If a man may deliver corn to a person to hold for him, and then get it back, there may be twenty sales with constructive deliveries to swell the returns. The object of the statute undoubtedly is, to ascertain the sales and price; but the mode, the test, the security, is, that the corn shall have been delivered. If the words true and *bond fide* do not apply to the delivery, why do they apply to the price?

BEST, C. J.—I do not mean to decide whether this return will exempt the party from penalties. The jury properly found that there was a delivery to the defendants to hold for the plaintiffs, though there was a sale to Loud. The object of the Legislature, by the act

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WOODLEY
& Another
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1824.
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of 1 & 2 Geo. 4, was to prevent the importation of corn till it had arrived at a certain price; and for this purpose, they only wanted to know the price at which it was sold: to whom delivered is a matter quite beside the policy of the act. There is nothing in the act which requires that the return shall express the name of the party to whom the corn was delivered. The words are, "sold and delivered," that is, what bargains are made for the sale. There is an express direction that the name of the buyer shall be introduced, but not that of the party to whom the delivery was made; and here the well-known maxim applies, "*Expressio unius est exclusio alterius.*" It is said, that fictitious bargains may be made, and an improper average formed in consequence. Such parties as do this may be indicted at common law for a conspiracy to defeat an act of Parliament, if there is no specific punishment in the act itself. I am of opinion that the verdict was properly found, and that the return had all the weight to which it was entitled.

The rest of the Judges agreed.

Rule discharged.

Dec. 17th.

WOODROFFE v. HAYNE.

If A. give an accommodation acceptance to B., which B. gives to C., as a security for some acceptances of his, and these ac-

ceptances, when they become due, are paid by B. out of the produce of other acceptances given by C. but A.'s acceptance is not given up, though C. is desired not to present it, and A. informed that it will not be presented:—Held, that the original transaction is continued; and A., not calling for the delivery of the bill, must be presumed to have allowed it to remain as a security in the hands of C. for such of his acceptances as were subsequent to those for which it was at first given.

THIS was an action on a bill of exchange, dated the 28th of October, 1823, for 300*l.*, at three months, drawn by one Symons on, and accepted by, the defendant, and endorsed by Symons to the plaintiff.

The usual formal proof having been given on the part of the plaintiff, evidence was adduced on the part of the

defendant, from which it appeared that the bill in question was an accommodation-acceptance, which Symons obtained from the defendant on the 28th October, 1823. It was sent to the plaintiff on the 29th, inclosed in a letter, which also contained two other bills for acceptance by the plaintiff, for the payment of which the bill on the defendant was to stand as a security. The plaintiff accepted these bills, and when they became due, money was provided to meet them by Symons, but the defendant's acceptance was not given up. Symons, on the 20th January, 1824, received two other acceptances from the plaintiff; and before the 31st of that month (when the bill on the defendant became due), in a conversation with him, told him that he need not present the defendant's bill, and that he would get him another of the same description, which, however, he failed to do. In the month of April, 1824, two further acceptances (making a third set) were received by Symons from the plaintiff, which became due on the 15th June. At the time when these were given, nothing was said about the 300*l.* bill on the defendant. On the 12th June, Symons became a bankrupt. It appeared, in answer to a question from the Chief Justice, that the old bills were paid off by money raised upon the new ones, and that the defendant was aware of this, and also knew, in the month of March, 1824, that his acceptance was outstanding, but had been informed by Symons that it would not be presented.

1824.
WOODROFFE
v.
HAYNE.

Pell, Serjt., on these facts, contended that the plaintiff was not entitled to recover.

BEST, C. J.—I am of opinion that the plaintiff is entitled to recover. The bill was, undoubtedly, originally given for the accommodation of Symons, with respect to the two first acceptances of the plaintiff. It is said that the defendant is discharged by the fact of those two acceptances having been paid. There would be something

1834.
 WOODROFFE
 v.
 HAYNE.

in that argument if the transaction had been then put an end to. But it was not: there was a continuance of the same debt. The defendant did not call for the bill, and it is to be presumed that he allowed it to remain as a security for the subsequent acceptances.

Verdict for the plaintiff.

Wilde, Serjt., and ———, for the plaintiff.

Pell, Serjt., for the defendant.

[Attornies—Wilde & Co. and Leigh.]

Dec. 32nd.

Cox and Others v. REID and Another.

The registered owner of a ship is, *prima facie*, liable for goods furnished for the use of that ship; but such liability may be rebutted by evidence of the credit having been given to others.

If there be a bill of sale of a ship, not containing any qualification, and such unqualified bill of sale be entered properly on the register, and there be also a deed of defeazance,

making void such bill of sale on the payment of a sum of money, the deed of defeazance may be given in evidence on the part of the defendant, charged, in an action for goods, as the registered owner, in order to shew the qualified nature of such defendant's ownership.

ASSUMPSIT for goods sold.

The demand was for copper furnished in the month of September, 1818, for the sheathing of a vessel called the *Asia*. That vessel, on the 7th of October, 1817, became the property of certain persons of the name of Bulmer, who, (as appeared from indorsements on the certificate of registry and a bill of sale), on the 20th of November in the same year, transferred their right to the defendants, who were bankers at Newcastle. The defendants retained their interest till the 7th of October, 1818, when they transferred it again to the parties from whom they had obtained it.

Vaughan, Serjt., for the plaintiffs, contented himself with proving these facts, and the delivery of the copper

during the time that the defendants appeared by the register to be the owners, resting his case on that liability, to which, he argued, in presumption of law, every registered owner is subject.

1824
Cox & Or.
v.
Reid
& Another.

Pell, Serjt., for the defendants, put in, first, a paper, which had been proved (on the cross-examination of one of the plaintiffs' witnesses) to be in the handwriting of a clerk of the plaintiffs. It was to this effect—

“ Limehouse, 1818.

Messrs. Richard and Joseph Bulmer, Drs.

To Cox, Kelly, and Young.

September 21st.—To amount of copper			
account for supplies to the ship Asia,			
as <i>per</i> bill	£ 635	15	1
November 14th.—Cr. By amount of ac-			
count for copper received <i>per</i> brig			
Claremont, as <i>per</i> bill	247	9	0

Balance in favor of Cox and Co. £ 388 6 1

Pell, Serjt., then proved that Joseph Bulmer gave the order for the copper in question. He also called a ship-broker, who stated, that he was employed from December, 1817, to October, 1818, to sell the Asia, which was then lying in the City Canal; that Joseph Bulmer was the person who employed, and the employment was only on the subject of the sale, and that, as far as he knew, Joseph Bulmer had the sole control of the vessel.

On his cross-examination, it appeared that Joseph Bulmer was dead; that he had been owner of many ships, and became a bankrupt; and that he acted after his bankruptcy as ship's husband to some of the vessels which had previously belonged to his estate.

1824.
 Cox & Ors.
 v.
 REID
 & Another.

Pell, Serjt., then offered in evidence a deed of defeazance, of the same date with the bill of sale from the Bulmers to the defendants, viz. the 20th of November, 1817, and between the same parties, making void the bill of sale, on payment, by the Bulmers, of a certain sum to the defendants.

The bill of sale was unqualified, and contained no allusion to the deed of defeazance.

Vaughan, Serjt., objected to the reading of the deed. It is a distinct instrument; the plaintiffs are not parties to it. Lord GIFFORD, on the trial of a former action, brought against the defendants by other parties, for goods furnished to the same ship, refused to receive it in evidence.

BEST, C. J.—With the greatest deference to my Lord GIFFORD, I think I ought to receive it. An endeavour is made to charge the defendants, not on account of their possession, but as they appear on the register to be owners, and surely they may be allowed to shew in what way, and subject to what qualification, that ownership exists.

Vaughan, Serjt.—It is contrary to the Register Acts, and therefore cannot be received; it is to control the operation, and do away with the effect, of the bill of sale.

BEST, C. J.—If it is not registered, and does not contain the original certificate, it is void. No instrument, not properly registered, can confer either a legal or equitable interest; but it may be received as a declaration of the party at the time, that although he was made owner, yet he was only made so for a particular purpose.

The facts were eventually left to the jury, for them to say to whom the credit had been given; BEST, C. J., ob-

serving, that, although a man's being registered owner made him, *prima facie*, liable, yet if it appeared in the particular case that the credit had not been given to him, his liability was done away with.

1824.
Cox & Ors.
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The jury found for the defendants.

Vaughan and *Bosanquet*, Serjts., and *D. F. Jones*, for the plaintiffs.

Pell, Serjt., *Tindal* and *Holt*, for the defendants.

[Attornies—*Swaine & Co.* and *Bell & Brodrick*.]

CASES
AT
NISI PRIUS.

AT THE
Sittings in Hilary Term.

COURT OF KING'S BENCH.
Sittings in London in Hilary Term, 1825.
BEFORE LORD CHIEF JUSTICE ABBOTT.

1825.
Jan. 31st.

M'INTYRE v. LAYARD, Esq.

A plaintiff may use as his evidence, answers given to interrogatories exhibited by the defendant in the cause; but if he does so, cannot object that some of them are not evidence, on account of their appearing to state the contents of written papers.

FALSE imprisonment.

Brougham, for the plaintiff, wished to read certain answers to interrogatories sent out by the defendant, under two rules of Court, for the examination of witnesses at Malta.

The *Attorney-General* objected. These depositions are taken by us, and, under the terms of the rule, it is not competent to them to read them as their evidence. We may use them or not as we please.

The rules were then referred to. One was for the examination, by the defendant, of certain witnesses at Malta, to be cross-examined by the plaintiff; and another for the

examination of witnesses by both parties. There was a provision that the depositions should all be transmitted to the Clerk of the Rules, and be "admitted to be read and given in evidence at the trial of the cause, saving all just exceptions."

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M'INTYRE
v.
LAYARD.

The Attorney-General. — If the plaintiff is allowed to do what he seeks to do, it will place us in a different situation to that we should have been in if the witnesses had been in Court; for, under the rule, we examine in chief and they cross-examine. If the witnesses had been here, and called by them, we should have cross-examined; and the terms of the rule do not say the depositions shall be read by each. I never knew of any instance of the kind, and on principle it is not good.

Brougham. — Both parties may read indiscriminately; they may use the depositions as a common fund, and the reason is this, the plaintiff would have examined these witnesses if the defendant had not done it for him. Cross interrogatories are in the nature of an examination in chief.

ABBOTT, C. J. — The distinction is, that on cross-interrogatories you may put leading questions.

After some further conversation, the answers were allowed to be read, subject to Mr. Attorney-General's objection.

In the course of their being read, *Brougham* made an objection to some of them, giving as his reason, that they were not receivable, inasmuch as they appeared to state the contents of written documents.

ABBOTT, C. J. — Are they not to be considered as your evidence?

1823.
 Rex
 v.
 HERRIN.

His Lordship directed the case to be struck out of the paper, which was done, and no jury was sworn on it.

Brodrick and Prendergast, for the prosecution.

Andrews, for the defendant.

[Attornies—*Pickering* and *Constable*.]

The case of *J'Anson v. Stuart*, 1 T. B. 748, was an action for a libel, which stated that the plaintiff was a swindler. The defendant pleaded a justification that the plaintiff was a swindler, and had been guilty of defrauding divers persons; but this plea was held to be bad, on the ground that it was too general, and that the defendant ought to have stated the instances of fraud by which he meant to support the charges imputed by the libel.

Feb. 18th.

LONG v. HORNE.

If the declaration state, that the defendant, being owner of a stage-coach, undertook to carry "the plaintiff, her children, and servants, together, in and by a certain stage-coach," evidence that the whole inside of the coach was taken for the plaintiff and her three daughters, and

ASSUMPSIT.

The declaration stated, that the defendant, being owner of a certain stage-coach, &c. in consideration that the plaintiff would engage six places or seats in and upon the said coach, for herself and three children and two servants, at and from the Golden Cross to Dover, together with their luggage, for reasonable hire, &c. the defendant undertook, &c. "to carry and convey the said plaintiff, her said children, and servants, and their luggage together, in and by the said coach." It then proceeded to aver, that the plaintiff took the places, and was ready with her children and servants to be carried, and requested the defendant to send a double-bodied coach, and refusing to take them, unless one of them would travel in one body and the other in the other body, is a breach of this agreement. The statute 50 Geo. 3, c. 48, enacting that double-bodied coaches shall only carry eight outside passengers, it is also a breach of the agreement that there were eight other outside passengers permitted to go by the coach, if the plaintiff's servants refused to go by it on that account.

ant to carry, &c. "in manner aforesaid;" yet the defendant, not regarding, &c. did not, nor would, when so requested as aforesaid, or at any other time, carry or convey the plaintiff and her said children, &c. in and by the said coach, or otherwise, or any or either of them, but wholly refused, &c. whereby the plaintiff was forced to hire another conveyance, &c. Plea—General issue.

1825.
Lone
v.
Horne.

It appeared that, on the 11th August, 1824, a person, who was a witness for the plaintiff, called at the defendant's coach-office, at the Golden Cross, Charing-cross, to take "*the whole inside of the Dover coach,*" for four ladies, and two outside places for their servants. The defendant's book-keeper said that they could not have those places, as one inside place was booked, but that three of the ladies might have inside places, and the fourth an outside place, or go by another coach. To this the witness replied, "That will not do, as all the ladies wish to travel together," and left the office, when he was followed by the book-keeper, who said that they would take the offer, and the four inside and two outside places were booked, and four pounds paid for them. And it further appeared, that on the day for which the places were taken, the plaintiff, a widow lady, her daughters, and two servants, went to the Golden Cross, and there found what is called a double-bodied coach, which is a coach having a coach body to contain four persons, and an additional body, like that of a chariot, in front of it, to contain two more; but the servants of the defendant refused to permit the plaintiff and her three daughters to travel together in the coach-body, but insisted on three of them travelling in that, and one of them in the chariot-body, because a passenger, previously booked, had secured a place in the former; however, this the plaintiff refused.

Scarlett, for the defendant, objected, that, on this evidence, the defendant appeared to have fulfilled his con-

1825.
Long
v.
Horne.

tract, as he gave the plaintiff four inside places, though in different parts of the carriage.

ABBOTT, C. J. — If a family of four ladies take inside places in a coach, saying they wish to travel together, I am clearly of opinion that you have no right to separate them.

Scarlett then objected, that it was not so laid in the declaration.

ABBOTT, C. J. — I think, as at present advised, that the declaration is supported by the evidence.

Evidence was then adduced, to shew that there were eight outside passengers on the coach, previous to the arrival of the plaintiff's servants, who, by the direction of the plaintiff, refused to go with that number; and that the plaintiff and her family and servants went by post-chaises, at an additional expense of 9/.

For the defendant, the licence from the stamp-office was put in, authorising ten outside passengers, and witnesses were called to prove that there was ample room for ten.

Gurney and *Chitty*, *contra*, relied on the statute 50 Geo. 3, c. 48, § 2, which enacts, "that all stage-coaches, called long coaches, or double-bodied coaches, shall be permitted to carry eight outside passengers, and no more, exclusive of the coachman, but including the guard, where there is a guard, under such fine or penalties" as are imposed by that act.

ABBOTT, C. J. — That puts an end to the case, and the plaintiff is entitled to recover the difference of the expense incurred.

Verdict for the plaintiff — Damages 9/.

Gurney and Burton, for the plaintiff.

Scarlett and Chitty, for the defendant.

1825.
Long
v.
Horne.

[Attornies—*Rose and Hinrick & Stafford.*]

EGERTON, Esq. v. FURZEMAN.

Feb. 18th.

ASSUMPSIT to recover the sum of one hundred pounds which had been deposited in the hands of the defendants, as the stake upon a dog-fight.

It was opened that the plaintiff was entitled to the stake because his dog had won the battle.

ABBOTT, C. J.—I certainly shall not try the case. I am of opinion that the time of the Court is not to be wasted in trying which dog or which man won a battle, as the whole of these wagers are illegal.

The case was ordered to be struck out of the paper.

Brougham and Holt, for the plaintiff.

Chitty, for the defendant.

[Attornies— ——— and ———.]

If an action, for money had and received, is brought against the stake-holder on a dog-fight, to recover the stakes, on the ground that the plaintiff's dog won; the Judge will order it to be struck out of the cause paper, as he will not try which dog won the battle.

Brougham intimated his intention of submitting a motion to the Court in this case, by putting down the name of it in the list of new trials to be moved; but when called on by the Lord Chief Justice, he declined making any motion.

April 29d.

1825.

EGERTON
v.
FURZEMAN.

In the case of *Henkin v. Guerau*, 2 Camp. 408, Lord ELLENBOROUGH refused to try an action for a wager, whether a person could be held to bail on a special original for a debt under 40*l.*, and the Court of King's Bench approved of what he had done. S.

C. 12 East, 247. And in the case of *Brown v. Leeson*, 2 H. B. 43, Lord LOUGHBOROUGH also refused to try an action for a wager respecting the number of chances in throwing seven and eleven on two dice.

Adjourned Sittings after Hilary Term, in London.

BEFORE LORD CHIEF JUSTICE ABBOTT.

Feb. 21st.

STABLES v. ELEV.

In an action on the case, for the negligent driving of the defendant's servant, if it appear that the defendant holds himself out to the world as the owner of the cart, by suffering his name to remain painted on it, and over the door of the house of business to which it belonged, the action is maintainable against him, although it is proved that he had for some days ceased to be owner of the cart and concerned in the business, having retained both of his former partners.

CASE, for an injury done to the plaintiff's carriage by the negligent driving of the defendant's carter.

It appeared that on the 20th of July, 1824, the plaintiff's wife was driving a poney carriage, when the cart came against the carriage at a very rapid pace, and broke it.

The defence was, that the cart was not the property of the defendant, but belonged to a person named King, and that the carter was the servant of Mr. King, who had been in partnership with the defendant, but that that partnership was dissolved on the 1st of July, 1824.

These facts were proved by Mr. King; but, on his cross-examination, he admitted, that, at the time of the accident, the defendant's name was on the cart and over the door of their house of business in Thames-street, and that when the plaintiff's clerk applied at that place for a compensation for the injury, he was not told of the dissolution of partnership.

ABBOTT, C. J., ruled, that as the defendant, by permitting his name to remain on the cart and over the door

of the house of business, held himself out to the world as the owner of the cart and the master of the driver of it, he was responsible for the negligence of such driver.

1823.
STABLES
v.
ELRY.

Verdict for the plaintiff—Damages 6*l.* 10*s.*

Scarlett and Comyn, for the plaintiff.

Murrayatt and Garney, for the defendant.

[Attornies—*Grimaldi & S.* and *Noy.*]

SMITH, Gent. one, &c. v. WATTLEWORTH.

Feb. 24*th*.

ASSUMPSIT for an attorney's bill for business done in the Insolvent Debtors Court. The first count of the declaration stated, that the defendant was indebted to the plaintiff for work and labour, &c. done and performed by the plaintiff for the defendant, "*as the attorney of the defendant*, about the prosecuting of insolvent business for the defendant, and for certain fees due, and of right payable, to the said plaintiff in that respect, and for drawing certain schedules," &c. To this were added the other common money counts.—The defendant was not sued by attachment of privilege, nor did the plaintiff declare as an attorney of the Court of King's Bench.

An attorney's bill for business done in the Insolvent Debtors Court, is a taxable bill; and to entitle him to recover its amount it must have been signed by him, and delivered a month before action brought, under the stat. 2 Geo. 2, c. 23.

It appeared, that, in May, 1822, the defendant being in execution procured his discharge under the Insolvent Debtors Act, the plaintiff being employed by him as his attorney for the purpose of obtaining such discharge. The plaintiff's bill had been taxed by the proper officer of the Insolvent Court; but it was admitted that the bill delivered to the defendant was not signed by the plaintiff,

1825.
 SMITH,
 Gent. one, &c.
 v.
 WATTLE-
 WORTH.

who was, in fact, an attorney of the Court of King's Bench.

Denman, for the defendant, objected, that the plaintiff could not recover, because the bill delivered was not signed by him. He could only act in the Insolvent Debtors Court as an attorney, because, if he was not an attorney, he could not by law practise there, as, by the Insolvent Debtors Act, none but attornies of one of the superior Courts could transact business in that Court.

ABBOTT, C. J.—Is there not some case where the bill was for business done at the Quarter Sessions? The plaintiff here sues for business done as an attorney, and I shall, therefore, nonsuit him, giving his Counsel liberty to move to enter a verdict for the plaintiff.

Nonsuit, with liberty to move to enter a verdict for the plaintiff for 10*l.* 6*s.*

F. Pollock, for the plaintiff.

Denman, for the defendant.

[Attornies—*J. & A. Smith* and *Clark*.]

In Easter Term, *F. Pollock* moved for leave to enter a verdict for the plaintiff in this case, and the Court granted a rule *nisi*.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITLEDALB, JS.
 In Bank.

June 17th. *Denman* now shewed cause. By the statute 2 Geo. 2, c. 23, § 23, it is enacted, that no attorney or solicitor of

either of the superior Courts shall commence or maintain any action or suit, *for the recovery of any fees, charges, or disbursements at Law or in Equity*, until the expiration of one month after delivery of his bill, signed, &c. Now this act does not at all limit these provisions to bills for business done in the Court of which the party is an attorney; and it has been held that a bill for business done at the Quarter Sessions, or at the Great Sessions of Wales, must be delivered a month under this statute; and there can be no reason why business done in the Insolvent Court is not equally business done *at Law*.

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HOLROYD, J.—The Insolvent Debtors Act (1 Geo. 4, c. 119), makes that Court a Court of Record for the purposes of that act.

Denman.—Even the exception, that a bill for conveying is not taxable, seems hardly warranted by the words of the statute 2 Geo. 2, c. 23. The only section of the Insolvent Debtors Act, 1 Geo. 4, c. 119, which appears to bear on this case in any way is § 31, which enacts that the Insolvent Debtors Court is to admit any number of fit persons, in their discretion, to practise as attornies or agents in that Court on behalf of prisoners in custody.

F. Pollock, in support of the rule, argued, that as the Insolvent Debtors Court might appoint persons to act as agents who are not attornies, if this Court held that a bill must be delivered by an attorney for business done there, it would cause one rule to be followed by attornies and another by agents; and, *2nd*, that this was not business in Law or Equity. The Insolvent Debtors Act was only temporary, and the business was neither matter of Law nor Equity, and the Court itself was only a Court of Record for the purposes of that act, and the items were not such as the Master in this Court could form an accurate judgment on; and, further, that under § 1 of the statute

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 SMITH,
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1 Geo. 4, c. 119, an officer is appointed to tax bills in the Insolvent Debtors Court.

BAYLEY, J.—No such officer is mentioned in the first section of that act.

F. Pollock.—No, my Lord; it allows the Insolvent Debtors Court to appoint officers, and such a one has been appointed; and, by § 48, that Court has a power, in certain cases, of awarding costs.

BAYLEY, J.—But those appear to be costs between party and party.

LITTLEDALE, J.—That Court may have even a power to tax costs; but it is another question whether an attorney of this Court can recover in an action brought here, unless he conforms to the statute 2 Geo. 2.

F. Pollock.—That will depend on whether it is business in *Law* or in *Equity*.

LITTLEDALE, J.—Is not the obtaining a person's discharge from a writ of execution business at *Law*?

F. Pollock.—This is, in reality, an excrescence on the *Law*, like the business of bankruptcy.

ABBOTT, C. J.—But it has been held, that a bill for obtaining a bankrupt's certificate is taxable, and the Lord Chancellor sitting in bankruptcy, that is certainly not business in *Equity*.

F. Pollock.—But the Insolvent Debtors Court having an officer to tax costs there, such a bill would hardly be taxable in this Court.

ABBOTT, C. J.—I think that the nonsuit in this case was right, and that a bill signed ought to have been delivered. The question is, whether this was business done at Law? Now, it being to discharge a person who was in custody under a writ of execution, it appears to me, therefore, to be business done at Law as much as business done at the Quarter Sessions. Mr. *Pollock's* argument is, that it would lay down two rules, one for those who practised in that Court and who were attornies, and another for those who were not. However, there are many things done at the Quarter Sessions which may be done by one not an attorney, such as serving notices, attending witnesses, and the like; and I think, this being business done at Law, and the plaintiff being an attorney, he cannot sue without having delivered his bill under the statute of Geo. 2. I do not think that that Court having an officer to tax bills is very material, because, however that may be convenient, it cannot do away the necessity of the bill being delivered.

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BAYLEY, J.—The Insolvent Debtors Court is a Court of Record, and it has power to discharge persons from process, and the attornies practising in it have to deliver briefs to Counsel, to subpoena witnesses, &c. It has been stated that there is an officer to tax bills, but the plaintiff being an attorney of this Court, it has a general superintending power. I think this business done at Law. The Insolvent Debtors Court either has an officer to tax bills or it has not: if it has, as soon as the bill is delivered, you may have it taxed by that officer; but if it has not, it may be taxed by the Master on the civil side of this Court. The statute of George the Second was intended for the benefit of the subject, and ought to receive a liberal construction.

HOLROYD, J.—I agree with the rest of the Court in thinking, that, in this case, a bill should have been delivered under the statute of Geo. 2.

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LITTLEDALE, J.—This business, though not done in what is ordinarily called a Court of Law, being for the discharge of a person from the process of this Court, is, in my judgment, business done at Law within the meaning of the act; and it is quite a different question whether the bill should be taxed in this Court or in the Insolvent Debtors Court.

Rule discharged.

Adjourned Sittings after Hilary Term, at Westm.

BEFORE LORD CHIEF JUSTICE ABBOTT.

April 11th.

DOE, on the dem. of CRAWSHAW, v. SHEPHERD.

Practice.—If the Court has set aside the judgment against the casual ejector, on the present defendant undertaking to enter in the consent-rule, plead, and take short notice of trial for the adjourned Sittings. The adjournment day being Monday, April 11, and the defendant having pleaded on Saturday, the Lord

SCARLETT moved for leave to enter this case for trial. In Hilary Term, the Court had set aside the judgment against the casual ejector, the defendant undertaking to enter into the consent-rule, plead, and take notice of trial, for the adjournment-day. The defendant had pleaded on the 9th of April (Saturday), and therefore the terms imposed on him by the Court above would be of no advantage to the lessor of the plaintiff unless the cause was entered forthwith, this being the adjournment-day, and the cause could not now be entered without a special order from his Lordship.

ABBOTT, C. J.—Take an order.

Chief Justice, on application being made on the 11th, allowed the cause to be entered.

1825.

WALTON v. GREEN.

April 13th.

ASSUMPSIT, for board and lodging supplied to the wife of the defendant he having turned her out of doors.

The defence was, that she had previously committed adultery.

The defendant's Counsel wished to give in evidence a statement that the defendant's wife had made to one of her husband's clerks, confessing that she had had a criminal intercourse with a person whom she named. This conversation took place just before her husband turned her out of doors.

Scarlett objected that what the defendant's wife said could not be evidence in an action against her husband.

ABBOTT, C. J.—I think it is evidence, because the question is, whether the defendant, her husband, was justified in turning her out of doors; and, therefore, what she says just previous to that time, as it formed part of the cause of her being so turned out, is in my opinion admissible.

The evidence was then received.—Several letters from her to her husband were also put in and read, they were written a short time previous to the conversation with her husband's clerk.

A witness also proved that, about that time, the defendant broke open his wife's writing-desk, and found a number of letters, which were put in. These letters were from two officers of the 85th regiment. They were about to be read, when the plaintiff's Counsel submitted to a

In *assumpsit*, for board and lodging supplied to the defendant's wife, if the defence is, the adultery of the wife, a statement made by her, confessing her adultery, which statement was made immediately previous to her husband turning her out of doors, is admissible in evidence on the part of the husband, and so are letters from different men, found by him at that time in her writing-desk.

Nonsuit.

1825.
WALTON
v.
GREEN.

Scarlett and Comyn, for the plaintiff.

Brougham and Tindal, for the defendant.

[Attornies—*Harnet and Blackstock & B.*]

April 14th.

REEVE, who sues, &c. v. POOL.

The penalty of twenty pounds per chaldron for every chaldron of coals of one sort, sold as and for another sort, inflicted by the stat. 47 Geo. 3, Sess. 2, c. 68, is a penalty exceeding 20*l.*, and therefore recoverable in the superior Courts, under § 150 of that statute.

DEBT, for penalties under the statute 47 Geo. 3, Sess. 2, c. 68, § 23, for the regulation of the vending and delivery of coals within twenty-five miles of the Royal Exchange.

The declaration stated, that, after the making of a certain act of Parliament, &c. and within three calendar months, &c. the defendant, on, &c. at, &c. being then and there a vendor of, and dealer in coals, did, within such part of the county of Middlesex as is situate within the distance of twenty-five miles from the Royal Exchange, in the city of London, knowingly and wilfully sell to one Thomas Burrows, Esq. one sort of coals as and for what they really were not, that is to say, fifteen chaldrons of a sort of coals called Wellington Main Coals, for and as a sort of coals called Russell's Walls-end Coals, the same coals, so sold as aforesaid, then and there being coals of a different sort from coals of the said sort called Russell's Walls-end Coals, contrary to the form of the statute, &c. whereby, &c. the defendant became liable to pay for his said offence the sum of 20*l.* per chaldron for each and every of the said chaldrons of coals so sold by him, the said defendant, as aforesaid, then and there amounting to the sum of 300*l.*, and thereby, &c. There were other counts similar to this, for other offences, on this section of the statute. *Plea.—Nil Debet.*

The facts having been proved,——

Brougham and Chitty, for the defendant, contended,

that this action was not maintainable, because by the 146th section of the act, all penalties not exceeding twenty pounds were only recoverable before a magistrate, within one calendar month after the offence; and though, by the 150th section, penalties exceeding 20*l.* are recoverable within three calendar months by action of debt, yet the forfeiture of 20*l.* a chaldron imposed by the 83rd section, on which this action is brought, is a twenty pound penalty, though, for a number of offences, it may amount to a larger sum; and if the penalties in this case were not recoverable before a magistrate, it would lead to this anomaly, that if a man sold one chaldron, the offence would be cognizable before a magistrate, but if he sold two, the remedy would be by action of debt.

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ABBOTT, C. J.— Might it not be intended by the Legislature that a magistrate should have power to decide where the matter in dispute did not exceed twenty pounds, but they did not choose to entrust cases of larger amount to his decision?

The Attorney-General, Denman, and Tindal, contra.— The selling of several chaldrons at one time is only one offence, and only one penalty is incurred by that offence, which penalty is estimated by the number of chaldrons sold.

ABBOTT, C. J. (having consulted with the other Judges, who were sitting in pursuance of the King's warrant).— The case must proceed, and if the objection is a good one, it is on the record.

Verdict for the plaintiff.

The Attorney-General, Denman, and Tindal, for the plaintiff.

Brougham and Chitty, for the defendant.

[Attornies—*W. L. Newman* and In person.]

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v.

POOL:

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITTLEDALE, JR.

In Bank.

April 26th.

Chitty now moved in arrest of judgment on the points taken at the trial; and cited the case of *Rex v. Rawlinson* (not reported), which was an application to this Court for a *mandamus*, to be directed to a magistrate, commanding him to hear a complaint on the 117th section of this same act, for a penalty "not exceeding 40s. a sack," for deficiency of measure, the complaint being for sixteen sacks; and in that case the Court granted the *mandamus*, although the 40s. penalty on sixteen sacks was above 20l.

BAYLEY, J.—The penalty in this case is so many times 20l. at all events, in the other it is *not to exceed 40s. a sack*; and I think the ground on which the Court went in the case of *Rex v. Rawlinson* was, that the magistrate could mitigate that penalty to a sum within his jurisdiction, and that though the offence, if visited by the heaviest penalty, would exceed the sum to which the Justice was limited, yet the informer, by going before a magistrate, must be taken to go for no larger a sum than 20l.

ABBOTT, C. J., having read the 33d section of the act, said,—The penalty imposed by this section is one penalty, the amount of which is to be regulated by the number of chaldrons, and is very distinguishable from the case of *Rex v. Rawlinson*. In that case there was a power of mitigating the penalty; and it is considered by the Court, that where a penalty can be mitigated it is meant to be recoverable before a Justice, as, on an action of debt in this Court, there can be no mitigation of the amount of the penalty.

HILARY TERM, 6 GEO. IV.

BAYLEY, J.—The cases are very distinguishable; and the present penalty is clearly recoverable by action.

HOLROYD and LITTLEDALE, Js. concurred.

Rule refused.

By the statute 47 Geo. 3, Sess. 2, c. 68, § 33, it is enacted, "That if any vendor or vendors of, or dealer or dealers in, coals, shall knowingly sell one sort of coals for and as a sort that they really are not, within the said port of London, or within the respective cities of London or Westminster, or the respective liberties thereof, or within such part or parts of the respective counties of Middlesex, Surry, Kent, and Essex, as is or are situated within the distance of 25 miles from the Royal Exchange aforesaid, every such vendor or vendors of, or dealer or dealers in, coals, shall forfeit and pay *for every such offence* the sum of twenty pounds *per* chaldron for every chaldron so sold; and such vendor or vendors of, or dealer or dealers in,

coals, shall not be subject or liable to any penalty imposed by the said recited act made in the 9th year of the reign of her Majesty Queen Anne, entitled, An act to dissolve the present and prevent the future combination of coal-owners, &c. or by the said recited act, made in the 3rd year of the reign of his late Majesty King George the Second, entitled, 'An act for the better regulation of the coal trade,' on every person who shall knowingly sell one sort of coals for and as which they really are not: Provided always, that no vendor or vendors of, or dealer or dealers in, coals, shall be subject to such penalty for or in respect of any number of chaldrons exceeding twenty-five chaldrons, for the same offence."

GREENING v. WILKINSON.

April 18th.

TROVER for East India Company's warrants for cotton.

Evidence was given that the cotton was worth sixpence per pound at the time of the refusal to deliver it up, but would now be worth tenpence-halfpenny.

they may find as damages the value at a subsequent time, in their discretion.

In trover, the jury are not limited to find as damages the mere value of the property at the time of the conversion, but

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v.
POOL,

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GREENING
WILKINSON.

The *Attorney-General* contended, on the authority of the case of *Mercer v. Jones*, 3 Camp. 477, that the damages should be the value at the time of the conversion.

Scarlett, contra, contended that it must be the price at the time of the verdict, in the same way as damages for the non-performance of an agreement to re-purchase stock.

ABBOTT, C. J. I think that case is hardly law, and that the amount of the damages is for the jury, who may give the value at the time of the conversion, or at any subsequent time in their discretion, because the plaintiff might have had a good opportunity of selling the goods if they had not been detained. I am therefore of opinion that the price of the article on the day of the conversion is by no means the criterion of the damages. It may be said, that if he had wanted cotton he might have immediately bought more, at that day's price, as soon as he found that this cotton was detained from him; but, then, to do that, he must have had the money, which he might not have ready on the very day of the detention, nor on any day after till the price had risen; and my opinion is, that the jury are not at all limited in giving their verdict by what was the price of the article on the day of the conversion.

Verdict for the plaintiff.

Scarlett and Comyn, for the plaintiff.

The *Attorney-General*, Gurney, and F. Pollock, for the defendant.

[Attornies.—*Mayhew and Beddome & B.*]

The case of *Mercer v. Jones*, 3 Camp. 477, was an action of trover for a bill of exchange: the plaintiff's Counsel contended that the amount of the damages ought to be the principal and interest

up to the final judgment. The defendant's Counsel contending that the verdict ought to be for the principal only; Lord ELLENBOROUGH said, "In trover the rule is, that the plaintiff is entitled

to damages equal to the value of the article converted at the time of the conversion;" and his Lordship directed a verdict for the amount of the bill and the interest up to the time of the conversion only.

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v.
WILKINSON.

COURT OF COMMON PLEAS.

Sittings at Westminster, after Hilary Term.

BEFORE LORD CHIEF JUSTICE BEST.

HELLINGS v. GREGORY the Elder and GREGORY the Younger.

Feb. 14th.

ASSUMPSIT on an attorney's bill.

The bill contained three sets of charges: one was for a journey to Bridgewater to inspect title-deeds, and was introduced in this form, "You having good reason to think yourself entitled," &c. Another set of charges was for business done in defending both the defendants in actions on a bill of exchange, of which one was the drawer and the other the acceptor: and the third set of charges was for business done on the elder defendant's taking the benefit of the Insolvent Debtors Act.

The plaintiff's clerk proved, with respect to the first set, that both defendants came to the plaintiff, and requested him to undertake the journey to Bridgewater; but, on his cross-examination, he admitted that the plaintiff had refused to do it on account of the father, and only

ney, and request him to defend them, and he does so on their joint application, there is sufficient consideration to support a joint promise to pay, and consequently to sustain a joint action by the attorney against them.

In an action on an attorney's bill, it is only necessary to give evidence of the retainer, and the delivery of the bill, the Prothonotary being the proper party to decide on the items of it.

In an action on an attorney's bill against two defendants, it is not sufficient to prove a joint employment, and a joint promise to pay, after the delivery of the bill, but it must be shewn that the business was done for the joint benefit.

If A. and B., being arrested on a bill of exchange, of which one is drawer and the other acceptor, go to an attorney,

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 v.
 GREGORY.

consented to go on the son's saying he would pay him.— The same witness proved, with respect to the second set of charges, that both defendants having been arrested at the suit of one Toggill, sent for the plaintiff, and came the next day to his office, and then the son paid the fees for two bail-bonds, and said he would pay the plaintiff whatever charges were incurred in the business for himself and father.— With respect to the third set of charges, no separate evidence was given; but it appeared that a copy of the whole bill was delivered to each of the defendants, and that they afterwards called together at the plaintiff's office, and acknowledged the receipt of the bill, and requested the plaintiff to give them time; the younger defendant saying, in the presence of his father, that it was impossible to pay it at once, but that, if the plaintiff would allow it, he and his father would pay it by instalments.

Wilde, Serjt., for the defendants, contended, that, upon this evidence, the plaintiff ought to be called. There is one charge, which it is quite clear cannot be against any but the elder defendant, viz. that which relates to his taking the benefit of the Insolvent Act; and this furnishes a key to the nature of the one which is made for the journey to Bridgewater. The charge is properly against the father, and the promise by the son is to pay his father's debt; and therefore the action cannot be maintained jointly, nor even against the son without an undertaking in writing. With respect to the defence of the actions on the bill, the circumstances of the case shew, that the two defendants were never jointly liable to the plaintiff. Suppose a man and his partner are separately sued for some demand, and both employ the same attorney, will that create a liability to sustain a joint action?

BEST, C. J. — It has been decided, that where no credit is given to one, and another undertakes to pay, it is not within the statute of frauds; but this case differs even

from that, for it appears that the credit is given to both. I do not think this case has occurred before.

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HELLINGS
v.
GREGORY.

Pell, Serjt., for the plaintiff.—I contend, that the evidence shews that the journey to Bridgewater was undertaken for both defendants. I abandon that part which relates to the discharge of the father under the Insolvent Act.

BEST, C. J.—I will leave it to the jury to say, whether the journey to Bridgewater was for the benefit of one or both.

Pell, Serjt.—That is not necessary. If I and another go to a third person, and employ him, whether it is for the benefit of one or not makes no difference. If two go to a builder and desire him to build a house, though one only is benefited, yet both are liable. We have only to look if the request be joint. The bill, in this case, was presented to both, and both come and promise to pay.

Wightman, on the same side.—The actions on the bill, it is true, were separate actions; against one of the defendants, as drawer, and the other, as acceptor: and yet, there is sufficient evidence for the jury to say, that there was a joint employment. There are many cases in which the statute of frauds does not apply on account of the original employment.

Wilde, Serjt., in reply, read some items of the bill, which were certainly separate charges, which, he contended, evidenced a separate employment.

BEST, C. J.—The words of the statute of frauds are, that no action shall be brought, to charge a defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement

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upon which the action is brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. I know it has been determined that if A. undertakes to pay for B., and no credit at all was given to B., A. is liable without a written undertaking. But it has been held, in many cases, that if any credit be given to B., A.'s undertaking must be in writing. If the business was done on the credit of both, but for the benefit of one, I think the action cannot be maintained. I shall, therefore, leave it to the jury to say, whether any part of the business was done for the joint benefit, for as to such part the plaintiff is undoubtedly entitled to recover. An observation has been made, which I consider to have great weight. It is said there are actions brought on the same bill, and though they are separate actions, yet each party has an interest in defending each action; and if the jury are of opinion, that it was for the joint benefit of both that the actions on the bill were defended, then the present action may be maintained.

Wilde, Serjt., then went to the jury on the questions, whether there was a joint undertaking, and whether the business was done for the joint benefit.

His Lordship told the jury, that, in his opinion, in point of law, the actions on the bill of exchange were defended for the benefit of both, and left it to them to say, whether they were, in point of fact, so defended, and on the undertaking of both; observing, that, in such case, the defendants might make a joint promise, and would be liable in the action.

The jury stated, that they considered the whole of the work as done on the undertaking of one of the defendants alone, and therefore found for the defendants.

Pell, Serjt., and *Wightman*, for the plaintiff.

Wilde, Serjt., for the defendants.

[Attornies—*Makinson* and *Potts*.]

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HELLINGS
v.
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Adjourned Sitings after Hilary Term, at Westm.

BEFORE LORD CHIEF JUSTICE BEST.

TRIGGS, Administratrix, v. NEWNHAM.

Feb. 16th.

ASSUMPSIT, on a bill of exchange, against the defendant as acceptor.

Pleas—The geueral issue and the statute of limitations.

The bill was made payable at the residence of a Mr. Cockerell, a solicitor.

The notary's clerk proved that he presented it about eight o'clock in the evening in the middle of the month of February.

Taddy, Serjt., for the defendant, contended that the presentment was not made at a reasonable time. He cited *Darbyshire v. Parker*, 6 East, 3.

BEST, C. J.—*Darbyshire v. Parker* does not apply to such a case as this. This case is distinguishable from the case where you are to give notice to a drawer. This is the case of an acceptor, and all that is required is, application or presentment at the particular place; and a presentment made at an attorney's office at eight o'clock in the evening, is, I think, quite in reasonable time.

A bill accepted, payable at the office of an attorney, is presented at a reasonable time, if presented at eight in the evening in the month of February.

If a party, when he is arrested, say, "I shall go to my attorney's and pay the debt and settle it," such statement is sufficient to take the case out of the statute of limitations.

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HELLINGS
v.
GREGORY.

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ence to a solicitor.

BEST, C. J.—It is not necessary that there should
new contract or a new promise, an acknowledgment is a.
that is required; for if a man acknowledges a debt to be
still due, the law implies a promise.

Verdict for the plaintiff.

Wilde, Serjt., and *Platt*, for the plaintiff.

Taddy, Serjt., for the defendant.

[Attornies—*Henson & D. and Carter.*]

Feb. 16th.

BEST, Esq. v. OSBORN.

A horse was
sold under a
written warren-
ty, contained

ACTION on the warranty of a horse.

The plaintiff's groom proved that he paid for the horse,

in a receipt for the purchase-money, which was given to the buyer's servant. The son of the seller (who was proved to have been present when the bargain was made, and to have acted at other times in his father's business, but never to have sold a horse by himself,) got the receipt back from the servant by a fraudulent representation:—Held, in an action on the warranty against the father, that, under such circumstances, parol evidence of the contents could not be given, but that the son must be called as a witness.—The son being called, proved that he went for the receipt by desire of a person named Tawney, the owner of the horse, for whom his father sold on commission, and did not mention the subject to his father till he had obtained it; his father then had possession of the receipt for a very short time, after which it was sent to Tawney:—Held, that this fact did not vary the case, so as to let in the parol testimony.

1825.
 TRIGGS
 v.
 NEWNHAM.

The sheriff's officer proved, that, on his saying to the defendant that he must have a copy of the warrant, the defendant observed, that he did not want it, for he should go to his attorney's and pay the debt and settle it.

Taddy, Serjt.—This is not sufficient to take the case out of the statute of limitations. It does not meet this issue. The plaintiff alleges a promise, and is to establish a contract by the defendant after he has been discharged from the demand by a very wholesome statute. This is no proof of a new promise or new contract, but a mere reference to a solicitor.

BEST, C. J.—It is not necessary that there should be a new contract or a new promise, an acknowledgment is all that is required; for if a man acknowledges a debt to be still due, the law implies a promise.

Verdict for the plaintiff.

Wilde, Serjt., and *Platt*, for the plaintiff.

Taddy, Serjt., for the defendant.

[Attornies—*Henson & D.* and *Carter*.]

Feb. 16th.

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The plaintiff's groom proved that he paid for the horse,

in a receipt for the purchase-money, which was given to the buyer's servant. The son of the seller (who was proved to have been present when the bargain was made, and to have acted at other times in his father's business, but never to have sold a horse by himself,) got the receipt back from the servant by a fraudulent representation:—Held, in an action on the warranty against the father, that, under such circumstances, parol evidence of the contents could not be given, but that the son must be called as a witness.—The son being called, proved that he went for the receipt by desire of a person named Tawney, the owner of the horse, for whom his father sold on commission, and did not mention the subject to his father till he had obtained it; his father then had possession of the receipt for a very short time, after which it was sent to Tawney:—Held, that this fact did not vary the case, so as to let in the parol testimony.

and took a receipt, and that the defendants's son (who was proved to have been present at the time the horse was sold,) came to him afterwards, and said, that he had seen the plaintiff at Long's Hotel, and was authorized by him to require that the receipt should be returned, upon which he gave it up.

1825.
BEST
v.
OSBORN.

Notice to produce it had been given, and the answer of *Vaughan*, Serjt. was, that the defendant had it not, nor ever had it.

Wilde, Serjt., was then proceeding to examine as to its contents—

Vaughan, Serjt., objected. They should call the son, to whom the paper was delivered.

Wilde, Serjt.—The son is in the father's service, and was in his company when the horse was bought. It is the same as if the father himself had gone and demanded the paper. The presumption is fair and natural, that, this being the same business, the son went by the father's direction. It is, *prima facie*, evidence of authority.

BEST, C. J.—The fact of the son's being present at the bargain one day, does not make him the father's agent to go another day and require, by a fraudulent representation, the delivery of the receipt.

Wilde, Serjt., then proved, in order to establish the agency of the son, that he had been seen acting in his father's business, shewing horses, and writing in the counting-house, after he had got the receipt back.—But the witnesses who proved it, admitted that they never saw him sell a horse by himself, but only in his father's presence.

1825.
BEST
v.
OSBORN.

BEST, C. J.—This will not do.

Wilde, Serjt.—I am not seeking to fix the defendant with any contract, but I am raising a fair presumption that, in this business, the son was acting as the father's agent. Supposing that there were no express directions to do the particular act, yet as it was done for the father's benefit, it will affect him. Besides, the subsequent service was an adoption of the act complained of.

BEST, C. J.—I am clearly of opinion that this is not evidence of agency. The son can only affect his father by such acts as are expressly authorized, or as come within the scope of a general authority. It is not pretended that in this case there was any express authority. And with respect to the general authority, it is admitted that the highest way in which it can be put is, that the son was a general servant: and what a situation would a master be in, if the act of his servant was to be admitted to shew that he himself was party to a fraud.

Wilde, Serjt., then called the defendant's son; who stated that he went for the receipt by the desire of a Mr. Tawney, who was the owner of the horse, (Tawney, as it appeared, having stated, that the defendant, who sold for him, had warranted without his authority), but did not tell his father before he went, nor till two or three days after he got it. When he told his father, his father only said, he wondered that Tawney had not got it before. The witness said he would not swear that he did not give the receipt into the hands of his father before he sent it to Tawney, but distinctly denied having received any orders from his father on the subject.

Wilde, Serjt., then proposed to give parol evidence of the contents of the paper, contending that he had traced it to the control of the defendant. A defendant cannot

say, after he has had notice to produce a document, I have delivered it to another person, for such conduct would prevent a plaintiff from giving parol evidence in such cases at all. Young Osborne's going was in the course of his employment, because if a man suffers his servant to go on the employment of another, apparently clothed in his authority, it must be so taken. The paper was sufficiently in the father's control; and his dispossessing himself of it, or his servant's doing so, will not prevent my notice operating.

1825.
BEST
v.
OSBORNE.

BEST, C. J.—Consistently with the rules of evidence, I cannot get the contents of this paper. If the father had it in his hands he could not keep it. The son was the agent of Tawney only. I quite agree with my Brother *Wilde*, that if the father had obtained the receipt, he could not prevent the operation of notice by handing it over to another. I would not suffer a man in possession of a paper to shuffle it out of his custody, for such conduct might drive the other party to call a most unwilling witness.

Wilde, Serjt., then consented to be nonsuited; saying, he could not, consistently with his Lordship's ruling, proceed with the case.

Wilde, Serjt., and *Dwarria*, for the plaintiff.

Vaughan, Serjt., and *Platt*, for the defendant.

[Attornies—*Beavan* and *Taylor*.]

1825.

Feb. 16th.

HARRIS v. COSTAR and Others.

If the declaration, in an action on the case against coach-proprietors, for an injury received by the overturning of a coach, state that it was their duty to carry the plaintiff *safely*, for a certain hire, it does not mean to carry safely at all events; but will be sufficiently supported by proof of the want of due care.

CASE.

The declaration stated that the defendants were proprietors of a mail-coach, and that the plaintiff was received as a passenger, to be carried safely for a certain hire, and that, in consequence, it became the duty of the defendants *to carry him safely*, yet that they, not regarding their duty, did not take proper care, but suffered the coach to be so overloaded, and drawn by such vicious and unmanageable horses, that it was overturned, and the plaintiff thereby injured, &c.

The principal witness was the coachman, who stated, that the plaintiff was the only outside passenger, that the only luggage on the roof was two small cases belonging to a person inside, and that the accident occurred in consequence of one of the leaders being startled by the flapping of a cover of a waggon which was blown to and fro. The horse, he admitted, had been only used as a wheeler till within four or five nights of the accident, but had no vice, and was a very fit horse for a mail.

Vaughan, Serjt., upon this, submitted that the declaration was not proved. There is no evidence of any overloading or of using any vicious horses, to say nothing of the form of the contract, which is quite new, that a passenger is to be carried, like a bale of goods, safely at all events.

BEST, C. J.—I shall not say that there is any such contract: but there is evidence to go to the jury to say, whether the injury resulted from some negligence or impropriety on the part of the defendants or their agents.

Wilde, Serjt.—Our objection is, that in all the counts such a contract is set out as your Lordship says is not a proper one.

BEST, C. J.—Is not this declaration in the common form? I understand it to mean, not that the coach-proprietor will ensure the limbs of his passengers, but that he will take due care.

1825.
HARRIS
v.
COSTAR
& Others.

Wilde, Serjt.—Here is a contract capable of proof, and therefore, after verdict, it will be presumed to have been proved. The form of the declaration is the same as it would be in the case of a lost parcel. The plaintiff ought to be nonsuited.

Taddy, Serjt.—The declaration is taken from that in *Brotherton v. Davis*, in the Exchequer.

BEST, C. J., assented, and repeated that he thought it was in the common form.

Wilde, Serjt.—In the case of *Brotherton v. Davis*, the point, of the contract not being proved, was not made. That was a case in error, and the point was set at rest by the verdict.

BEST, C. J.—The point did occur, and Chief Justice DALLAS said, that the contract need not be proved at the trial. If it had been the first time that this form had been used, I should have said, that it did not mean that the coach-proprietor undertook to convey safely absolutely, but that it was to be construed like all other instruments, taking the whole together, and meant that the defendants were to use due care.

Vaughan, Serjt., inquired if his Lordship would give them leave to move?

BEST, C. J.—If you had made me doubt I would have saved the point, but I think it is too clear.

1833
HARRIS
v.
GORTAN
& Others

Vaughan, Serjt., then went to the jury, contending that the gist of the action was negligence, and that was negatived by the evidence.

BEST, C. J., then summed up, repeating his opinion upon the law, and leaving it to the jury to say, whether they thought the plaintiff's injury had been produced by the negligence of the defendants or their servants, and if they did, to find their verdict for him.

Verdict for the defendants.

Taddy, Serjt., and *Wightman*, for the plaintiff.

Vaughan, and *Wilde*, Serjts., for the defendants.

[Attornies—*Tyrrel & Sons* and *Hinrick & S.*]

*Adjourned Sittings after Hilary Term, at
 Guildhall.*

BEFORE LORD CHIEF JUSTICE BEST.

Feb. 21st.

LEIGH v. SMITH.

If goods be sent to a wharf, to go by a vessel to any place on the coast of England, the wharfinger does not discharge his duty by de-

livering them to one of the crew, but should deliver them to the captain of the vessel, or some other person in authority on board it. *Semble*, that it is his duty, either by himself or his servants, to see the goods put on board, and then make an entry of the shipment.

THIS was an action by a soap-boiler at Liverpool, against a wharfinger in London, to recover the value of a hogshead of tallow, sent to the defendant's wharf for the purpose of being conveyed to Liverpool by a ship called the *Mars*, and which the plaintiff had never received.

A carman proved that he deposited the hogsheads, with the plaintiff's direction on them, at the wharf, three or four yards from the vessel, and did not see either the captain or mate.

1825.
Lutten
v.
Smith.

The mate of the *Mars* proved, that he received two hogsheads, directed to the plaintiff, and no more. He also said, "We take no charge of the goods till we actually take them on board."

The master of the vessel confirmed the mate's testimony as to the receipt of two hogsheads only; but added, that there were three entered in the wharfinger's book, and, in consequence, he looked about for the third, but was not able to find it.

Vaughan, Serjt., for the defendant.—I admit that, for the wharfage, the wharfinger is bound to put the goods into the charge of the party belonging to the ship. He does not undertake to ship or forward. When he once calls the attention of the people of the ship to the goods, he has done his duty.

BEST, C. J.—A wharfinger receives goods, and he is to keep them till they are shipped; and, further, he is to see that the persons belonging to the ship do in fact ship them.

Vaughan, Serjt., then cited the case of *Cobban v. Down*, 5 Esp. N. P. C. 41, and contended, that it was enough for the wharfinger to make an entry in his book of the goods, as he had done in this case, such entry being notice to the captain, and throwing upon him the duty of searching for them and putting them on board.

BEST, C. J.—If the entry were to be considered enough, what a situation would persons be in if the goods were to be lost, the day after they were sent, through the negligence of the wharfinger.

1825.
LEIGH
v.
SMITH.

Vaughan, Serjt.—The officer of the ship may load at his own convenience, but his responsibility commences with the notice. If the goods are stolen in the intermediate time between the notice and the loading, the ship-officer is liable.

BEST, C. J.—The ship-officer is not liable till he gets the custody of the goods.

Vaughan, Serjt., then called the defendant's clerk, who proved that the hogshead in question was rolled in his presence to within three or four yards of the vessel; that his attention was called away for some time, and when he returned he did not see it there; that he entered it as shipped, supposing it to be so; that he could not say whether or no the mate was immediately on the spot at the time, but that the men were.

Vaughan, Serjt., then proposed to ask a wharfinger this question: "What is the usage with respect to goods that are going coastwise as to the mode of delivery into the hands of the captain or mate?"

Wilde, Serjt., objected.

Vaughan, Serjt., mentioned again *Cobban v. Down*, before cited.

BEST, C. J.—On the authority of this case I shall receive the evidence of the usage.

The witness then stated the usage to be, for the wharfinger to receive the goods and keep them dry, and then for the ship's company to come and roll them to the ship, and for one of the clerks to take an account of their being placed at the quay-side, to be taken to the ship, and that, from such time, the ship's company were considered to

take the charge. On his cross-examination, he said, "We deliver to the mate of the ship."

1825.
LEIGH
v.
SMITH.

BEST, C. J.—I am of opinion that this is an usage abundantly in favour of the wharfinger, and that it ought not to be extended. If it could, a delivery might be to a cabin-boy. A wharfinger must prove, by distinct evidence, that he delivered to the mate or an officer of the ship.

Vaughan, Serjt.—Not into his hands, I presume. The mate, in this case, was, it appears, superintending the loading.

Wilde, Serjt., then replied.

BEST, C. J., called up the mate, who said, in answer to a question put by his Lordship, that he took all the casks of tallow on board which were pointed out to him.

His Lordship, then, in his charge to the jury, observed—The only question in this case is, has the cask in question been lost through the negligence of the wharfinger or of the master or mate of the ship? It is the duty of the wharfinger to see that goods sent to him go by some ship or other. It is not by his servants that they are put on board, but he is to see that they are removed by the crew of the ship. I question if the case which has been cited is not a little too narrow. But that case decides that there must be a delivery to the master or mate; and I should hope that a wharfinger never will be held to have done his duty, if he delivers to one of the crew only. He must deliver to some one in authority. The clerk to the defendant should have stood by and seen the cask taken on board, and then entered it. His evidence does not prove a delivery to some one in authority. There are cases in which a delivery even to the mate will not do. Suppose

1885.
 LEMON
 v.
 SAMPSON.

the mate cannot take the goods in in one day, and they are obliged to remain till the next, no man in his senses will say that the wharfinger is not responsible during the intervening time. In my opinion, it is the duty of the wharfinger to say, "There, mate, are your casks, take them on board." If the case strikes you so, then, the plaintiff is entitled to a verdict, for the wharfinger has not done his duty.

Verdict for the plaintiff.

Wilde, Serjt., and Parke, for the plaintiff.

Vaughan, Serjt., and E. Lawes, for the defendant.

[Attornies—*Slade & J. and Clark, F. & C.*]

Feb. 22nd.

GILLMAN and Another v. ROBINSON.

If a tradesman living in the country receive goods, ordered on his behalf by a person in London, and pay for them in several instances, he is liable for goods furnished on an order given by such person afterwards, tho' he did not receive them, such person having appropriated them to his own use.

ASSUMPSIT for goods sold.

The plaintiffs resided in London, and the defendant at Driffeld, in Yorkshire. A man, named Womack, ordered the goods on behalf of the defendant, but intercepted them on their way, and applied them to his own use. Womack had bought goods of the plaintiffs, as well as of other houses, several times before, as the agent of the defendant, for which the defendant had paid.

Vaughan, Serjt., for the defendant, submitted, that he was not liable. It would be most mischievous to hold, that because I give an agent authority to purchase for me, it is to give him an unlimited power to use my name, and pledge my credit to any extent. Suppose I admit the proof that there was employment in certain specific instances, yet a jury are not, thereby, warranted in finding

the existence of an unlimited authority, nor is it, indeed, any evidence to go to them of such a fact. General agency may be presumed in cases of underwriting policies of insurance, or drawing bills of exchange. There, if the act be done in several instances, it is enough; for the nature of the transaction is such, as to raise the inference of authority. But the case of ordering goods is different. It may apply to an agent abroad: and is a man's credit to be pledged all over Europe? It is better to suffer a private mischief than a public inconvenience; and nothing is so mischievous and inconvenient as to imply a general authority from a few specific instances. *Non constat*, but in those instances in which the defendant recognized the dealing, Womack had a particular authority.

1825.
GILLMAN
& Another
v.
ROBINSON.

BEST, C. J.—There is abundant evidence to go to the jury. I agree that one transaction is not enough to raise the presumption of general authority, but several instances are, I think, sufficient. This case cannot be distinguished from the cases of master and servant, unless the jury should be satisfied that Womack's authority was terminated at the end of each transaction. One of two innocent persons must suffer for the fraud of a third. The defendant should have notified that his authority only applied to the particular transaction; and if he held out the party as his agent, and the seller trusted him upon that, the defendant is the one of the two innocent persons who ought to suffer.

From the evidence on the part of the defendant, it appeared that he gave Womack written instructions, by letters, as to what he was to buy for him.

Wilde, Serjt. replied.—The question is not, what were the private instructions of the defendant to Womack, but how he sanctioned Womack in connection with the London houses.

1825.

GILLMAN
& Another
v.
ROBINSON.

The London houses would not, by the course of business, see the letters. They have no means of knowing whether a man is a general or particular agent except by the way in which the principal acts. The defendant ought to have said, Do not trust Womack generally for me, but always ask him for his letters. Evidence can never go higher than this. Here is payment to several houses as well as the plaintiffs, for goods received through Womack's orders. *Whitehead v. Tuckett*, in 15 East (a), decides, that private instructions cannot limit a general authority.

BEST, C. J.—Upon principle, if a man holds another out to the world as his general agent, he is responsible for his acts; and it is important that it should be so, because, otherwise, a man might accredit another, and, after he had cheated many to their ruin, turn round and say, Though this man appeared as my agent, yet he had no authority from me. You must be satisfied, not only that the goods were ordered for the defendant, but that the authority of the party ordering them was so far recognized as to render the defendant responsible. It is admitted, that, in the cases of policies and bills of exchange, agency is proved by several instances. This feature in the law of agency is not confined to those cases, but applies equally and similarly to the ordering of goods.

Verdict for the plaintiffs.

Wilde, Serjt., and *F. Pollock*, for the plaintiffs.

Vaughan, Serjt., and *Parke*, for the defendant.

[Attornies—*Willis & Co.* and *Eyre & C.*]

1825.

KERRISON v. COATSWORTH.

Feb. 26th.

THE plaintiff was the proprietor of a stage-coach, and brought this action to recover damages for an injury done to his coach by the negligent driving of defendant's carter.

The man who drove the coach was called as a witness for the plaintiff.

In an action, for an injury done to a stage-coach by a cart, the coachman is not a competent witness for the plaintiff, without a release.

Pell, Serjt., submitted that he must be released, on the authority of *Morish v. Foot*, 5 Moore, 508 (a).

BEST, C. J.—My own opinion would have been the other way; but as the Court of Common Pleas have so decided, I am bound by their authority.

Holt mentioned that Mr. Justice **BAYLEY**, all through the Circuit, ruled in a contrary manner.

BEST, C. J.—The Court of Common Pleas having decided the question, the opinion of a Judge at *Nisi Prius*, however respectable, cannot justify me in ruling in opposition to that decision.

Wilde, Serjt., as *amicus curiæ*, mentioned, that the Court of King's Bench had lately recognized the case of *Morish v. Foot*.

Verdict for the plaintiff.

(a) The case of *Morish v. Foot* was an action for negligently driving a mail-coach against a horse, which was drawing the plaintiff's waggon, by which it was killed; and it was there held, that the plaintiff's waggoner was not a competent witness to prove

that the accident was caused by the fault of the mail-coachman, without a release from the plaintiff; because, if the accident was caused by his own fault, the plaintiff might bring an action against him.

1825.

KERRISON
v.
COATSWORTH.

Vaughan, Serjt., and *Holt*, for the plaintiff.

Pell, Serjt., for the defendant.

[Attornies—*May*, Sen. and *Willey*.]

Feb. 28th. BRINLEY and Another, Assignees of HORNE, a Bankrupt, v.
KING.

The declarations of a bankrupt to a party with whom he is dealing, respecting his transactions in trade, are not evidence to prove the trading of such bankrupt.

ASSUMPSIT, for wages due to the bankrupt, as master of an East India ship.

Proof having been given of several sales to Horne, of goods to be exported,—*Wilde*, Serjt., in answer to a question from BEST, C. J., stated, that he relied upon such proof as establishing a trading.

BEST, C. J., intimated, that there must be evidence given of some act of selling.

A witness was then called, who stated that he had had conversations with Horne before his bankruptcy.

Wilde, Serjt., put this question—“What did you learn from him in those conversations respecting his transactions in trade?”

Pell, Serjt., objected. This is not a legitimate question, on the broad principle, that a bankrupt is not a competent witness to prove any fact which is necessary to support his commission. The declarations enquired after might be made in contemplation of bankruptcy.

Tindal, on the same side. The admissions of a bankrupt are received *ex necessitate*, and only in equivocal

cases, as, for instance, to make out, when he was going in a coach, with what intent he was going. But that which is now sought to be done, is beyond all rule.

1825.
BRINLEY
& Another
v.
KING.

Wilde, Serjt., contra. — The declarations of a bankrupt are evidence to prove the petitioning creditor's debt. Declarations of motives are receivable, whether the acts are equivocal or not. If the admission of the bankrupt is receivable to prove the debt, why not to prove the trading? The admission I seek to give in evidence is not made by the man after he has done trading, but at the time of his dealing, and to the party with whom he is doing business.

Pell, Serjt. — The ground on which the acknowledgment of a bankrupt is evidence of what is due to the petitioning creditor is, that, at the time he makes it, he is charging himself with a debt.

BEST, C. J. — I think it is a general rule, that nothing which a bankrupt says can be given in evidence to support his commission. But there are exceptions to this rule; and one is, when the declaration accompanies an act, because there is no other mode of explaining the act. Another exception is, where he makes admissions to decrease his estate. All that relates to the bankruptcy should be proved by other witnesses.

Verdict for the defendant.

Wilde, Serjt., and Chitty, for the plaintiffs.

Pell, Serjt., and Tindal, for the defendant.

[Attornies—*Freeman & H. and Sweet & Co.*]

See the case of *Parker v. Barker*, 3 Moore, 226.

1825.

NORTON v. HERRON.

If a man describe himself, in the beginning of an agreement to grant a lease, as making it on behalf of another, but in the subsequent part of it say that he will execute the lease, he is personally liable.

THIS was an action to recover damages for the breach of an agreement in the following terms:—

“Memorandum of an agreement made this 14th day of April, 1824, between George Herron, on the behalf of Edward Barron, of the one part, and James Norton of the other part, to wit, first, the said George Herron doth hereby agree to execute unto the said James Norton a lease of all that messuage, &c. situate, &c. late in the possession of ——— Nicholls, to hold, from the 12th of May, being the half-quarter between Lady-day and Midsummer now next ensuing, for seven, fourteen, or twenty-one years, at and under the annual rent of 130*l*.” &c.

A tenant, who was in possession, refused to quit, and the plaintiff could not obtain his lease.

Pell, Serjt., on behalf of the plaintiff, contended that the defendant had rendered himself personally liable, though he had described himself at the beginning of the agreement as making it on the behalf of another. He cited the cases of *Appleton v. Binks*, 5 East, 148, and *Burrell v. Jones*, 3 B. & A. 47.

Vaughan, Serjt., for the defendant, contended, that *Appleton v. Binks* did not apply, inasmuch as that was an action of covenant, and not, like the present, merely *assumpsit*. The terms, heirs, executors, and administrators, used in that case, shew an intention to bind the heirs, &c. though the party is described as only agent. But, in the present case, all that the party says is,—I, as agent for Barron, agree that Barron shall grant a lease. The defendant has no interest in the subject-matter of the agree-

ment. It appears from the second case cited, that the parties intended to be bound personally, and that the word solicitors was mere description. It was evidently their intention to pay the money there sought to be recovered; but it could not be the intention of the defendant in this case to make himself personally liable. The rule of *respondeat superior* applies wherever there is a known principal.

1825.
NORTON
v.
HERRON.

BEST, C. J.—It is said, that as the defendant entered into the contract on behalf of Barron, therefore the action should be brought against Barron. The case of the deed is stronger than this: but the last case cited was that of a simple contract. In that it was held that the word solicitors was mere description, and I cannot distinguish between that case and the present; and I am of opinion that the agreement is binding on the defendant. The cases of brokers are different, because, there, the fact of agency is known to every one; but, in this case, the man, after describing himself as agent, goes on to contract in his own name.

Verdict for the plaintiff.

Pell and Wilde, Serjts., and *F. Kelly*, for the plaintiff.

Vaughan, Serjt., for the defendant.

[Attornies—*T. Bennett* and *Collingwood*.]

ROWLAND v. ASHBY and Another.

March 3d.

ASSUMPSIT for goods sold.

It became necessary, in the course of the defence, to state facts which transpired at an examination before Commissioners of Bankrupt, but which were not taken down in writing.

Evidence may
be given by pa-
rol of material

1825.
ROWLAND
v.
ASHBY
& Another.

prove a partnership between the plaintiff and his son, who had been a bankrupt; and to do this, *Wilde*, Serjt., asked the attorney who produced the written examination of the father under the commission, whether the father had not, at such examination, admitted the partnership?

Vaughan, Serjt., objected. They are concluded by the written examination, and cannot be allowed to give parol evidence of any thing in addition to it. This case is analogous to those which occur under the statutes of Philip and Mary in cases of felony; and, under those statutes, it would not be permitted to add any fact not taken down by the magistrate.

BEST, C. J.—I shall presume, in the first instance, that every thing that was material was taken down; but if evidence is offered to me of the contrary, I think I must receive it.

Wilde, Serjt., mentioned the case of one *Peacock*, who was tried for murder at Kingston, in which ROOKE, J., (GARROW, B., being defendant's Counsel,) admitted parol evidence of something which passed before the Coroner, but which he had not taken down.

BEST, C. J.—I think it is proper evidence to go to the jury. It is matter of strong observation to them that it is not likely any thing important did pass, or else it would have been taken down. I do not see how I can get over receiving the evidence.

Vaughan, Serjt., and *Richards*, for the plaintiff.

Wilde, Serjt., and *Chitty*, for the defendants.

[Attornies—*W. Jones* and *Stephens*.]

OXFORD SPRING CIRCUIT.

1825.

BEFORE MR. BARON GARROW & MR. JUSTICE LITTLEDALE.

OXFORD ASSIZES.

(*Civil Side.*)

BEFORE MR. JUSTICE LITTLEDALE.

BROWN v. TANNER.

1825.

March 3d.

ASSUMPSIT.

The first count of the declaration stated, that there had been an action commenced by the defendant against the plaintiff on the warranty of a horse, and that, on the 6th of April, 1824, an agreement was entered into by the parties, who agreed with each other, that each of them would "well and truly stand to, obey, abide, observe, perform, fulfil, and keep the award, order, arbitrament," &c. of John Richmond and Joseph Lousley, so that they made their award before the 26th of April, in the year aforesaid; and in case they did not, that the parties would "well and truly stand to, obey, abide, observe, perform, fulfil, and keep the award," &c. of Thomas Pocock, so that he made his award before the 10th of May: and that, in consideration thereof, and that the plaintiff had under-

Assumpsit lies for revoking a submission to arbitration, not under seal, before award made, altho' it contains no express agreement not to revoke, but only the words "agrees to stand to, abide, perform," &c. the award: and, in such case, the plaintiff may declare that the defendant agreed to stand to, &c. and that he would not revoke

and lay as a breach, that the defendant hindered the umpire from making his award, by revoking; with such counts, the plaintiff may join counts on the award, and the Judge, at the trial, will not put the plaintiff to elect which set of counts he will go upon; and if, in giving damages on the counts for revoking the submission before award made, the jury include the expenses of the award, the Court above will not grant a new trial, as such a mistake ought to have been mentioned at *Nisi Prius*.

1825.
 BROWN
 v.
 TANNER.

taken to perform, &c. the said agreement, the defendant undertook, &c. to perform, &c. "and that he, the said defendant, would not revoke the said submission," or the authority of the said arbitrators and umpire, or prevent them, or any of them, from making an award.—It was averred, that the time had elapsed without the arbitrators making any award, and that the umpire was ready to do so, yet, the defendant, not regarding, &c. before the time for the umpire to make his award had expired, to wit, on the 26th of April, revoked his said submission, hindered and prevented the arbitrators from making their award, and the umpire from making his umpirage, by means of which the plaintiff had lost, &c.

The second count was nearly similar, and stated the contract in the same way as the first count; but the breach was laid to be, that the defendant "wrongfully revoked his submission," so as to prevent the arbitrators and umpire from making an award.

The third and fourth counts were on the award, and there were also the common money counts. Plea—General issue.

The plaintiff's Counsel opened a case upon the award, but stated, that if the defendant set up as a defence to that, that he had revoked his submission, such defence would establish a case for the plaintiff on the first and second counts.

The defendant's Counsel insisted, that the learned Judge ought to put the plaintiff's Counsel to elect which set of counts he would go upon, as they were incompatible claims, and he therefore ought to go on the award as a good award; or if he said the submission was wrongfully revoked, if that was actionable, he might go on those counts, abandoning the others.

LITTLEDALE, J.—If the counts cannot be joined, you might have demurred: but as the record is here, the

plaintiff may go on all his counts, and if, at the end of the cause, I think a case is made out on any one count, on that count, which ever it is, I must direct a verdict for the plaintiff.

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The agreement of submission, dated April 6, 1824, was then put in. It was not under seal, and was a submission to "stand to, obey, abide, observe, perform, fulfil, and keep," the award of the arbitrators and umpire before mentioned, but it contained no express agreement that the parties would not revoke the submission, nor that they would not hinder the arbitrators or umpire from making their award.

The award, dated on the 5th of May, was also put in, by which the umpire awarded the defendant to pay to the plaintiff 19*l.* 18*s.* including the costs of the reference and of the award.

For the defence, a deed executed by the defendant was put in: it was dated April 26th, and by it the defendant revoked the authority of the umpire; and a witness proved that this deed was read over to the umpire on that day.

LITTLEDALE, J., ruled, that, upon this evidence, the plaintiff was entitled to a verdict on the first and second counts, on the authority of *Vynior's* case, 8 Co. 82 a., and that the proper measure of damages, for such injurious revocation, was the sum the plaintiff would have received if the defendant had not so revoked.

Verdict for the plaintiff—Damages 19*l.* 18*s.*

Taunton and Chilton, for the plaintiff.

Curwood and Carrington, for the defendant.

[Attornies—*Hollier and Sheen.*]

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COURT OF EXCHEQUER.

BEFORE ALEXANDER, C. B., GRAHAM, GARROW, AND
HULLOCK, BS.—In Bank.

April 21st.

Carrington moved for a rule nisi, for a new trial: 1st, because the Judge ought to have put the plaintiff to elect which set of counts he would go upon, the two sets of counts being for incompatible claims. If it had appeared in the record that it was the same submission that the defendant was charged with revoking in one set of counts, while in the others he was sued for not obeying a good award made upon it, that would have been a good ground of demurrer; and the learned Judge ought not to allow a party, at the trial, to go upon claims so contradictory that he could not state them in his declaration. The present declaration could not be successfully demurred to, because, *non constat*, but there were two submissions, one followed by an award, and the other revoked before award made. The practice at the trial is assimilated to the rules of pleading; what is a departure in pleading is a variance at the trial, and the like.

HULLOCK, B.—You had better proceed to your next point. In declarations, it often happens that the claims in different counts are incompatible. You declare on a bill, and if that fails, you may resort to a count for goods sold, which were the consideration of it; these are incompatible, for if the bill is good, you can have no claim for the goods.

Carrington.—A second point is, that, as the submission was not under seal, and as there was no express agreement not to revoke, the recal of the authority of the umpire was not a ground of an action. 3rd. That the declaration was not supported by the evidence, the declaration stating an agreement to submit and *not to re-*

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voke. Now there was no evidence of the latter part of it, and on that part the breach was assigned. And, 4th, That the learned Judge directed the verdict for too large a sum, as the 19*l.* 18*s.* included the stamp on which the award was written. Now, as the award was after a revocation, the defendant could not, at any rate, be charged with that.

The Court granted a rule *nisi*.

The learned Judge's report having been read, their Lordships held, that the error in amount of the damages ought to have been mentioned to the Judge at the trial; and it ought not to be made the ground of the great expense of a new trial, that the verdict was taken, by mistake, for 30*s.* or 40*s.* too much.

May 7th.

Taunton and *Chilton* shewed cause on the other points. Every submission to award contains an implied promise not to revoke, which the party breaks by revoking such submission. If a party agrees to stand to an award, and puts it out of his own power to do so, he is as much guilty of a breach of the agreement as if he lets the award be made and then disobeys it. It has been long settled, that if a party agrees to do a thing, and by his own act makes it impossible, he thereby breaks his agreement.

ALEXANDER, C. B.—I will put this case: Suppose a man revoke his submission for due cause, as that he finds out that the arbitrator had secret meetings with the opposite party, would he then be liable on the implied *assumpsit*?

Taunton.—I apprehend he would, but that would go in mitigation of damages.

ALEXANDER, C. B.—It can hardly be law, that if a man finds out, just in time to save himself, that he has

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trusted people, who are grossly misconducting themselves, that he is obliged to pay them damages and costs, because he deprives them of an authority that they are abusing.

Carrington, in support of the rule.—There is no case of an action for revoking a submission which was not under seal, and in no case is this implied *assumpsit* ever mentioned. In *Vynior's* case, 8 Co. 82 a., it is laid down, that a submission is in its nature revocable, though it is made irrevocable by its terms; if it is by obligation, the penalty becomes single; but if it is without obligation, the party “shall lose nothing, for *ex nuda submissione non oritur actio*,” and for this the Year Book, 5 Edw. 4, 3 b. is cited, which goes to exactly the same effect as does Bro. Abr. tit. *Arbitrament*, pl. 35: and in the judgment of GIBBS, C. J., in the case of *Lee v. Joseph*, 5 Taunt. 452, that doctrine is also recognised. In the case put by my Lord Chief Baron of cheating arbitrators, it is absurd to contend that a party would be liable to an action of *assumpsit*; and I submit that a submission, not under seal, is in law an authority, and, like every other authority, it is lawfully revocable, and that, for revoking it *per se*, no action lies; but that if a party, by an injurious revocation, causes damage to the opposite party, he is liable, in a special action on the case, for the exercising of a lawful power to the injury of another, on the principle of the rule *sic utere tuo*, &c. there being many cases where a party is liable to an action on the case for doing a thing in itself lawful, but which works injury to another, as in cases of nuisance, and the like. The other point is, that the evidence does not support the declaration. The first and second counts state an agreement to stand to, &c. *and not to revoke*, and the breach is assigned on the latter part. Now, the agreement in evidence did not contain any stipulation not to revoke, and was therefore materially different from the agreement stated in the declaration. It has been said, that if a party agrees to stand to an award,

and by his own act prevents any from being made, he breaks his agreement. But, then, the plaintiff should have declared on it as an agreement "to stand to the award," and have laid it as a breach, that the defendant did not "stand to the award:" and if, at the trial, the plaintiff had given such facts in evidence, as, in the opinion of the learned Judge, would support that breach, he would be entitled to a verdict.

ALEXANDER, C. B.—We shall consider of this case.

The Court now gave judgment on the application for a new trial.

June 22d.

ALEXANDER, C. B.—This was an action against the defendant upon an award. The parties agreed to refer to two arbitrators, so that they made their award by a certain day, and if they did not make any award in time, it was then to go to an umpire. Before the umpire had made his award, which he did on the 5th of May, the defendant, by a deed, dated on the 26th of April, revoked the authority of the umpire. This action was brought for the defendant's not standing to, and abiding by, the award of the umpire, and we think the verdict should not be set aside. We think the action maintainable in its present form. In *Vynior's* case, we find that a submission is countermandable, but that, on a countermand of it, the obligee shall take the benefit of the bond, because the other party does not "stand to, and abide" by, the award; and if one prevents an award, he thereby breaks his agreement to "stand to, and abide by, the award." In the very recent case of *Warburton v. Storr*, Lord Chief Justice ABBOTT went upon that doctrine. If a man makes a condition impossible, he thereby makes himself liable to the penalties of a non-performance of it. In this agreement of reference, we find the words "stand to, abide, and

HEREFORD ASSIZES.

(Crown Side.)

BEFORE MR. JUSTICE LITTLEDALE.

March 25th.

REX v. HOBBY.

Practice.—The notice of a defendant's intention to try a traverse is not a condition precedent to its being tried, and the prosecutor, if he appears, aids all defects in it; and he is not allowed to appear for the purpose of objecting to the notice.

PERJURY.

The defendant had traversed the indictment to the present assizes.

Cross, for the prosecution, objected, that the defendant had given no sufficient notice of his intention of trying his traverse.

Ludlow and *Maule, contra*, argued, that the prosecutor appearing by his Counsel, aided all defects that there might be in the notice, for that there was no law requiring any notice, but it was a mere regulation of practice, because the case should not be taken behind the prosecutor's back and by surprise upon him.

Cross.—In parish appeals, nothing is more common than for Counsel to attend, merely to object to the notice, and if it was not so in this case, the defendant would take an acquittal, because no one appeared to object to the notice being insufficient.

LITTLEDALE, J. (having conferred with GARROW, B.)—This notice is not condition precedent to the party being tried, and if any one appears for the prosecution, that aids all defects in the notice. The notice is merely to apprise the prosecutor that the defendant intends to enter the tra-

verse for trial. And if the defendant gave no notice at all, and the prosecutor expecting the case to come on appeared, the defendant might still take his trial; and the prosecutor in this case must either appear or not, and if he appears for one purpose, he must appear for all.

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v.
Hobby.

The trial then proceeded and the defendant was

Acquitted.

Cross, for the prosecutor.

Ludlow and *Maule*, for the defendant.

[Attornies—*Pateshall* and *Spencer*.]

GLOUCESTER ASSIZES.

(*Crown Side*.)

BEFORE MR. JUSTICE LITTLEDALE.

REX v. CODRINGTON.

April, 4th.

INDICTMENT for obtaining money by false pretences. The indictment (which was extremely long) charged that the defendant obtained the sum of 29l. 3s., by falsely pretending to a person named Varlow, that he was entitled to a reversionary interest in one-seventh share of a sum of money left by his grandfather, whose name was Wickes; turns out that the vendor has in fact previously sold his interest in the property to a third person. This is not sufficient to support an indictment for obtaining money by false pretences.

If one professes to sell an interest in property, and receives the purchase money, the vendee taking the usual covenant for title, and it

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whereas in fact he was not entitled to any interest in any share, &c. negating the pretences. Plea.—Not guilty.

It was opened, that the defendant pretended that he was entitled to the reversionary interest mentioned in the indictment, and thereby induced Varlow, the prosecutor, to purchase it on the 22d December, 1824, at the price of 29l. 3s., the defendant having in fact sold all his interest in it to a person named Pick, on the 18th of September, 1824.

To prove the pretence, a deed dated Decr. 22, 1824, assigning the defendant's interest in his one-seventh share of the money to Varlow, was put in, and *in this deed there was the usual covenant for title.*

Ludlow, objected, that this deed was no evidence of any false pretence, for if it was, every breach of every covenant would be indictable.

LITTLEDALE, J.—Certainly, a covenant in a deed cannot be taken to be a false pretence.

The prosecutor was then called, and he proved that the defendant asked him to purchase a seventh share of some money that he would be entitled to under his grandfather's will on the death of one of his relatives, and that he agreed to purchase it, and got a deed of assignment executed to him, and he thereupon paid the defendant the purchase money.

To prove the falsehood of the pretence, the previous assignment by the defendant to Pick was put in.

Ludlow, objected, that the prosecutor did not advance the money in consequence of the verbal pretence used by the defendant, but took the covenant as his security. What passed between the parties by parol was afterwards embodied in the deed; it was a mere breach of covenant.

Palmer, contra.—This indictment charges that the de-

fendant obtained the money by pretending that he was entitled to this reversionary interest. That pretence we prove to be false; and yet it is to be contended, that because he reiterated that pretence in a deed, it becomes no offence.

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Ludlow, in reply.—It is not every thing which is untruly stated at the time of a bargain which is an indictable false pretence. If A. B. sold a horse, and warranted him five years old, and it were proved that to his knowledge he was but four; he might be indicted for swindling; or, to come nearer this case, if a man sold a piece of land as 100 acres, without saying “be the same more or less,” and in fact the land was only 99 acres and a half, he might be transported; this is really only a breach of covenant.

LITTLEDALE, J.—The doctrine contended for on the part of the prosecution, would make every breach of warranty or false assertion at the time of a bargain, a transportable offence. Here the party bought the property, and took as his security a covenant that the vendor had a good title. If he now finds that the vendor has not a good title, he must resort to the covenant. This is only a ground for a civil action.

Verdict—Not guilty.

Palmer, for the prosecutor.

Ludlow and *Justice*, for the defendant.

[Attornies ——— and ———.]

(Civil Side.)

BEFORE MR. BARON GARROW.

April 5th.

BARTON and Others v. CORDY.

If parties having a right to a garden, have given another notice not to trespass there, and afterwards they give that person half a year's notice to quit "all gardens held of them" at a time later than all the alleged trespasses, they can bring no action for such trespasses, because they have since acknowledged the defendant as their tenant.

TRESPASS *quare clausum fregit.*

Plea.—General issue.

The alleged trespass was proved to have been committed in a garden in which the defendant's cottage was situated, and it appeared that the cottage, garden, and a piece of land had belonged to the defendant's wife, who had a power of appointment; and that, for a sum of 90*l.* she had executed an appointment in favor of one James Mallet, in fee, reserving to her husband and herself a right of occupying the cottage for their lives. Mallet had become insolvent, and had assigned all his property to the plaintiffs for the benefit of his creditors; and they, on the 18th of May, 1824, gave the defendant notice not to trespass in the garden.

The trespass was, that the defendant was seen digging in the garden at several times in the year 1824.

The defence was, that, since all the trespasses, the plaintiffs had treated the defendant as a tenant, and therefore they had precluded themselves from treating him as a trespasser.

A notice signed by all the plaintiffs was put in; it was dated on the 18th of March, 1825, and it gave the defendant notice to quit "all and all manner of garden ground that he held of them" at Michaelmas, 1825.

Some evidence was offered to show that the defendant had two gardens, but that failed.

GARROW, B., observed, that, from this notice, it appeared that the plaintiff treated the defendant as a tenant after the alleged trespasses, and his Lordship doubted whether he ought not to nonsuit; however, he would ask the jury what damages they would give, and allow the defendant's Counsel to move to enter a nonsuit.

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Verdict for the plaintiffs, with nominal damages.

Taunton and *Ludlow*, for the plaintiffs.

Curwood and *Russel*, for the defendant.

[Attornies—*Bloxsome & Wells* and *Ward*.]

COURT OF EXCHEQUER.

BEFORE ALEXANDER, C. B., GRAHAM, GARROW, AND
HULLOCK, BS.—In Bank.

In the ensuing Easter Term, *Curwood* moved for leave to enter a nonsuit, and the Court granted a rule *nisi*.

Taunton now shewed cause. The notice to quit was a surprise on the plaintiffs, and in fact applied to another garden which was held by the defendant. The plaintiffs had the right of possession, as was proved by their title deeds, and they had given a notice not to trespass; and after that it ought hardly to be held that the notice to quit could apply to the same garden in which they had given a previous notice not to trespass.

May 6th.

Curwood and *Russel*, *contra*, were stopped by the Court.

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& Others
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ALEXANDER, C. B.— It is conceded, that if this notice applied to the garden in question, a nonsuit ought to be entered. Therefore, it becomes a question whether the notice is large enough to include the place in question. By its terms it includes all gardens. I think a nonsuit must be entered.

GRAHAM, B.— It is hard to conceive that any person could be so foolish as to give such a notice as would defeat his own action; but if he has done so, the Court cannot help him. Even if there were two gardens, the defendant was in possession of both, and as the notice is to deliver up all gardens it would apply to them both.

GARROW, B.— I believe in my conscience that no one ever heard of this poor man having two gardens, till the exigency of this case made it necessary. My learned brother has said that it was foolish to give such a notice as this, but some wise persons like to have two strings to their bow. ‘Get rid of this man we will,’ said Mr. Wells, ‘and if we cannot make out this to be a trespass, we will give him a notice to quit, and get him out by an ejectment.’

HULLOCK, B. concurred.

Rule absolute for entering a nonsuit.

1835.

REX v. THOMAS HILL.

April 7th.

INFORMATION in nature of a *quo warranto*, calling on the defendant to shew by what authority he exercised the office of a burgess of the borough of Monmouth.

This was a special jury cause, and only eight special jurors appeared.

Taunton for the relator prayed a tales.

The common jury panel was called through, and only two common jurors appeared.

The Counsel for the relator asked to have talesmen necessary for the completion of the jury taken from the by-standers, and contended that the case of the *King v. Dolby*, 3 Dow. & Ryl. 311, only proceeded on the ground that but one coroner summoned the talesmen; and further, that if his Lordship did not think that course right, he would adjourn the case to give time to procure the attendance of other jurors.

The Counsel for the defendant argued, that, under the stat. 7th and 8th of Wm. 3, c. 32, § 3, the talesmen could now only be persons who were summoned as jurors to try the other causes, and could not be now taken from the mere by-standers.

GARROW, B.—At the beginning of this assizes seventy-two persons were summoned as jurors to try the whole of the causes; and in this case there not being a sufficient number of special jurors, and a tales being prayed, any of those persons who appeared might serve as talesmen on this jury; but, since the statute, I think no other persons can. I have been asked to order other jurors to be summoned, but I have not any authority to make such an order. The cause must therefore stand over to the next assizes.

The cause was then made a *remanet*.

Since the stat. 7 & 8 W. 3, c. 32, talesmen can only be taken from the panel of the jury summoned to try the other causes, and not from the by-standers.

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 Rex
 v.
 Tmo. Hill.

Taunton, Ludlow and Cross, for the relator.

Campbell, Russel, Philpotts and Carrington, for the defendant.

[Attornies—*Powles & Tyler and Bryan.*]

REX v. TIPPING.

On the trial of an information in nature of a *quo warranto*, which has been made a special jury cause, jurors who have been summoned to try the prisoners on the crown side of the assize are not thereby qualified to act as talesmen.

AN information in the nature of a *quo warranto*, calling on the defendant to shew by what authority he exercised the office of a burgess of Monmouth.

This was also a special jury cause.

In this case also only eight special jurors appeared; and on *Taunton* for the relator praying a tales, four of the jurors who were summoned on the crown side of the assizes, for the trial of the felonies, but who were not on the common jury panel on the civil side, appeared.

Ludlow suggested that those jurors were summoned to try issues joined between the crown and the subject, and that therefore they might serve as talesmen.

GARROW, B. — I think they cannot serve. This cause must also stand over.

This cause was then made a *remanet*.

Taunton, Ludlow and Cross, for the relator.

Campbell, Russel, Philpotts and Carrington for the defendant.

[Attornies—*Powles & Tyler and Bryan.*]

ADDENDA.

COURT OF KING'S BENCH.

BEFORE BAYLEY, HOLROYD AND LITTLEDALE, JS.

(Who sat under the King's Warrant.)

JONES v. JOHN WILLIAMS.

1825.

SEE *ante*, p. 459.

The rule for a new trial in this case now came on to be argued.

Feb. 16th.

Taunton and *Campbell* shewed cause, and argued that by the charter in this borough the aldermen were empowered to appoint deputies, and as the aldermen were to act as justices of the peace, their deputies could exercise all the functions of their office in the same manner as the aldermen themselves. *Molins v. Wetby*, 1 Lev. 76. And a deputy must exercise the whole powers of his office. *Parker v. Kett*, 1 Salk. 96. According to the doctrine of the other side, the deputy would be only so of half the office, that is, of the ministerial and not of the judicial part of it. The aldermen are to act as justices; this is not that two offices are to be held by one person, but that the person holding the office of alderman is to have additional powers. Judicial officers may appoint deputies under express authority in the charters of the crown, of which the Recorder of London is an instance.

BAYLEY, J. — All the charters of the city of London have been confirmed by act of parliament.

Taunton. — Another point is, that being at most only a deputy justice, the defendant was not entitled to notice

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 WILLIAMS.

of action; but though the word deputy-justice does not occur in the statute which directs notices of action, it is clear that every justice, *de facto*, is entitled to such notice.

Godson, in support of the rule.—It ought to be observed, that, in this case, the alderman is not to appoint a deputy generally, but only for executing his office of alderman. And he then argued, that even the King could not allow a private individual to appoint a justice: and he cited the statute 27 Hen. 8, c. 24, § 2, which enacts, that no person or persons shall have any power or authority to make any Justices in Eyre, Justices of Assize, Justices of the Peace, or Justices of Gaol Delivery, but that all such officers and ministers shall be made by letters patent under the King's great seal; and Vin. Abr. tit. *Prerogative of the King*, (M. b.) pl. 21, page 89; and Com. Dig. tit. *Officer*.

HOLROYD, J.—The King gives the burgesses a power to appoint aldermen who are justices.

Godson.—But I take the distinction to be between a body corporate and a single individual.—(He was then stopped by the Court.)

BAYLEY, J.—This question turns partly on the power of the Crown to enable an individual to appoint a justice, and partly on the terms of the charter. It is not necessary to decide, whether the act of Parliament (27 Hen. 8.) has taken away from the Crown the power of giving such an authority; my present opinion is, that the act of Parliament has that effect; but if it has not, the words of the Crown must be most clear; and, considering the powers of a justice of the peace, and that the execution of that office so much depends on the talent and integrity of the party holding it, there ought to be a selection made

by some persons having competent authority. The instances of the Recorder of London and the Judges of Wales have been mentioned, but in both those cases the mode of appointing is confirmed by act of Parliament; and, besides, the power of appointing deputies is clearly given in distinct terms; but the language of this charter is such, that, even if the Crown had the power contended for, it appears that the Crown only meant these deputies to be deputies of the office of alderman only, and the position of the clauses in the charter clearly shews that. The powers of an alderman vary in different boroughs, but they always have superior rights to the rest of the burgesses. In this borough there are to be two aldermen; and if by death or amotion there be a vacancy, an additional alderman is to be appointed. Now, every one of these, before he acts, is to take an oath, which is a hold on his conscience for the due performance of his office; and then there is a clause that the aldermen shall be justices. It is not the aldermen and their deputies, as it would have been, if the Crown had so intended; and we think the Crown has not given that power to the deputy which it has to the alderman. The alderman must take an oath before he acts, he must have the qualification of being a burgess, and he must be elected by the other burgesses. Now, for a deputy, none of these things are necessary; and if the statute of Hen. 8th has not taken away from the Crown the authority of giving such powers, at least they ought to be given by most express words, and I therefore think that the nonsuit must be set aside.

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JONES
v.
WILLIAMS.

HOLROYD, J. — By the charter, the original two aldermen and the additional one in case of death or amotion, are to be elected, and they are to act as justices of the peace; but it by no means follows that that becomes part of the office of alderman; it is, in fact, uniting two offices in the hands of one person. I do not know that an alderman, as such, has any known powers *virtute of-*

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ficii; but the aldermen generally have powers given them by the charter which directs their appointment, and these powers are over corporate matters, which can be executed by a deputy; and when we see that the King, in his charter, says, that the deputy is to execute the "office of alderman," it is clear it was not intended that the deputy should act as a justice, even if the statute of Hen. 8th has not taken away the power of the Crown to grant such authorities to constitute a justice of the peace; and the defendant, not being a justice, was clearly not entitled to notice of action.

LITTLEDALE, J., concurred.

Rule absolute for a new trial.

BEFORE ABBOTT, C.J., BAYLEY, HOLROYD, & LITTLEDALE, JS.

In Bank.

GRAY and Another v. COX and Others.

SEE *ante*, p. 184 and 491.

May 10th.

This case having been again argued, by *J. L. Adolphus*, for the plaintiffs, and *Campbell*, for the defendants, the Court now gave judgment on the motion for a new trial.

ABBOTT, C. J., (after stating the nature of the case)—
 On the general question, whether on a sale of goods for a specific purpose, a warranty is to be implied that they are reasonably fit and proper for that purpose, I continue to be of the same opinion that was expressed by me at the trial, although some of my Brother Judges are as strongly of a contrary opinion. We do not, however, feel ourselves called upon to decide that question; for, allowing that a person who sells a commodity for a specific purpose shall

be taken, by law, to undertake that it was reasonably fit and proper for that purpose, yet the plaintiffs have not, in this case, declared on that implied warranty; as the declaration states, in general terms, that the defendants undertook that the copper in question should be good, substantial, and serviceable. Now we are all of opinion, that a warranty to that extent, and in those unqualified terms, could not be implied by law out of the circumstances attending the sale of an article like this, of which the defects were equally unknown to both parties at the time of the sale. The rule must therefore be made absolute.

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 GRAY
 & Another
 v.
 Cox
 & Others.

Rule absolute for a new trial.

BEFORE BAYLEY AND HOLROYD, JS.

Sitting under the King's Warrant, (*absente* LITLEDALÉ, J.)

BROMAGE and Another v. PROSSER.

SEE *ante*, p. 475.

The motion for a rule for a new trial in this case having been argued, the Court took time to consider, and

June 2d.

BAYLEY, J., now delivered the judgment of the Court. After stating the facts, as proved at the trial, his Lordship said—The learned Judge, at the trial, does not appear to have treated this as a privileged communication; but as if he considered that as the words were not spoken maliciously, though they had caused an injury, the defendant would be entitled to a verdict. If in a communication, not privileged, the question of malice was a question for the jury, the learned Judge's direction was right; but if, in such a communication, the malice is a conclusion of law, and the

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 BROMAGE
 & Another
 v.
 PROSSER.

Judge ought to withdraw that question from the consideration of the jury, then the direction was wrong. Malice, in common acceptation, means ill will, but its legal meaning is, wilful infliction of injury on another; as if I strike a man I never saw before, or poison a fishery, or do any act from which a general depraved inclination to mischief may be inferred. Russel, 614. So, if I traduce a man's character, whether I know him or not, or whether I intend to do him an injury or not, that is, legally speaking, malicious; the injury to him is equal, and a compensation ought equally to be given for it. However, it is laid down, that, in a declaration for words, the words need not be laid to be spoken *malitiosè*. Styles, 392; Ow. 51; Noy, 35. In cases of privileged communication, such as statements made in giving characters to servants, or in confidential advice, malice, in fact, must be proved; but these have been always considered as excepted cases. In the case of *Edmonson v. Stephenson*, Bull. N. P. 8, Lord MANSFIELD appears clearly to have treated the former as an excepted case; and in *Weatherston v. Hawkins*, 1 T. R. 110, the plaintiff's Counsel (the late Mr. Baron Wood,) stated that, in an action for a libel, it is not necessary to prove express malice, for if it be slanderous, malice is implied; and the same doctrine held in an action for words, where, though the declaration allege them to be spoken "falsely and maliciously," no express malice need be proved. Lord MANSFIELD says, that the general rules had been correctly stated by Mr. Wood, but took the distinction that the case then under consideration was peculiar, from its respecting the character of a servant: and Mr. Justice BULLER says, that that is an excepted case, on account of the occasion of the making the communication: and in 3 T. R. 61, that learned Judge goes on the same doctrine. And in *Hargrave v. Le Breton*, one, &c. 4 Burr. 2425, it is laid down, that there must be malice, either express or implied. Had it been left to the jury in this case to say, whether the defendant had spoken what he did as

honest advice to the person to whom he spoke, it might then have been left to the jury to say, whether there was malice or not; but as this was treated as an ordinary case of slander, we think that the question of malice ought to have been excluded from the consideration of the jury; and we think (and my Brother LITTLEDALE concurs in our opinion,) that a new trial ought to be granted.

1825.
BROMAGE
& Another
v.
PROMER.

Rule absolute for a new trial.

BEFORE ABBOTT, C. J., BAYLEY, HOLROYD, & LITTLEDALE, JS.

In Bank.

GREEN, Executrix of BOWERS, v. DAVIS.

GREEN v. DAVIS.

SEE *ante*, pp. 451 and 452.

In each of these cases, *Taunton* had moved to set aside the verdict, and the Court having granted rules *nisi*, had directed the cases to stand over, that the parties might compromise them; however, both *Taunton's* rules were made absolute.

LEE v. LEVI.

SEE *ante*, p. 553.

Gurney and *Chitty* now shewed cause against the rule; and argued, that a giving of time to the acceptor, whether before or after action brought, equally discharged the other parties to a bill, and that it was an equal injury to them whenever it was given.

July 15th.

1825.
BARTON
& Others
v.
CORDY.

ALEXANDER, C. B.— It is conceded, that if this notice applied to the garden in question, a nonsuit ought to be entered. Therefore, it becomes a question whether the notice is large enough to include the place in question. By its terms it includes all gardens. I think a nonsuit must be entered.

GRAHAM, B. — It is hard to conceive that any person could be so foolish as to give such a notice as would defeat his own action; but if he has done so, the Court cannot help him. Even if there were two gardens, the defendant was in possession of both, and as the notice is to deliver up all gardens it would apply to them both.

GARROW, B. — I believe in my conscience that no one ever heard of this poor man having two gardens, till the exigency of this case made it necessary. My learned brother has said that it was foolish to give such a notice as this, but some wise persons like to have two strings to their bow. ‘Get rid of this man we will,’ said Mr. Wells, ‘and if we cannot make out this to be a trespass, we will give him a notice to quit, and get him out by an ejectment.’

HULLOCK, B. concurred.

Rule absolute for entering a nonsuit.

1825.

REX v. THOMAS HILL.

April 7th.

INFORMATION in nature of a *quo warranto*, calling on the defendant to shew by what authority he exercised the office of a burgess of the borough of Monmouth.

This was a special jury cause, and only eight special jurors appeared.

Taunton for the relator prayed a tales.

The common jury panel was called through, and only two common jurors appeared.

The Counsel for the relator asked to have talesmen necessary for the completion of the jury taken from the by-standers, and contended that the case of the *King v. Dolby*, 3 Dow. & Ryl. 311, only proceeded on the ground that but one coroner summoned the talesmen; and further, that if his Lordship did not think that course right, he would adjourn the case to give time to procure the attendance of other jurors.

The Counsel for the defendant argued, that, under the stat. 7th and 8th of Wm. 3, c. 32, § 3, the talesmen could now only be persons who were summoned as jurors to try the other causes, and could not be now taken from the mere by-standers.

GARROW, B.—At the beginning of this assizes seventy-two persons were summoned as jurors to try the whole of the causes; and in this case there not being a sufficient number of special jurors, and a tales being prayed, any of those persons who appeared might serve as talesmen on this jury; but, since the statute, I think no other persons can. I have been asked to order other jurors to be summoned, but I have not any authority to make such an order. The cause must therefore stand over to the next assizes.

The cause was then made a *remanet*.

Since the stat. 7 & 8 W. 3, c. 32, talesmen can only be taken from the panel of the jury summoned to try the other causes, and not from the by-standers.



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APOTHECARY.

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ASSAULT.

See WITNESS, 16.

1. If a person enter a house with force and violence, the person whose house is entered, may justify turning him out (using no more force than is necessary), without a previous request to depart. But if the person enter quietly, a request to depart is necessary before turning him out. *Tullay v. Read*. 6
2. In assault, where there is a justification of *molliter manus* to all the counts in the declaration, the plaintiff cannot be admitted to prove excess, unless he has new assigned: otherwise, where there is a justification pleaded to one count, and the general issue to another. *Bowen v. Parry*. 394
3. In assault, battery, and imprisonment, the defendant justifies the whole: if by the evidence it appears that the defendant improperly knocked the plaintiff down in addition to putting him in irons, the plaintiff cannot recover; as, if he meant to admit that all was proper except the knocking down, and to proceed for that only, he should have new assigned. *Gale v. Dalrymple*. 381

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2. An attorney is bound to disclose communications made to him which do not regard either the bringing or the defending of an action. *Williams and others v. Mudie and others*. Page 158
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5. In an action on an attorney's bill against two defendants, it is not sufficient to prove a joint employment, and a joint promise to pay after the delivery of the bill, but it must be shewn that the business was done for the joint benefit. If *A.* and *B.* being arrested on a bill of exchange, of which one is drawer and the other acceptor, go to an attorney, and request him to defend them, and he does so on their joint application, there is sufficient consideration to support a joint promise to pay, and consequently to sustain a joint action by the attorney against them. *Hellings v. Gregory*. 627

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6. An attorney's bill for business done in the Insolvent Debtors Court, is a taxable bill, and to entitle him to recover its amount, it must have been signed by him, and delivered a month before action brought under the statute, 2 G. 3, c. 23. *Smith, Gent. one &c. v. Wattlenorth.* Page 615

AWARD.

Assumpsit lies for revoking a submission to arbitration not under seal before award made, although it contains no express agreement not to revoke, but only the words, "agrees to stand to, abide, perform," &c. the award. And in such case, the plaintiff may declare that the defendant agreed to stand to, &c. and that he would not revoke, and lay as a breach that the defendant hindered the umpire from making his award by revoking; with such counts, the plaintiff may join counts on the award, and the judge at the trial will not put the plaintiff to elect which set of counts he will go upon; and if, in giving damages on the counts for revoking the submission before award made, the jury include the expenses of the award, the Court above will not grant a new trial, as such a mistake ought to have been mentioned at *Nisi Prius.* *Brown v. Tanner.* 651

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2. A bankrupt can never be a witness to prove his own act of bankruptcy. *Ibid.*
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7. A creditor has a right to call on his debtor for his money at the debtor's lodgings, or other place, where he knows him to be, though it is not his place of business. And a denial to a creditor there is as much an act of bankruptcy as if it were his place of business. *Park and others v. Prosser.* 176
8. If a trader absents himself from any place to avoid a creditor, it is

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9. In an action against annuity brokers (who have become bankrupt) for laying out the money of the plaintiff on bad security, the solicitor under their commission is compelled to produce their books under a *subpœna duces tecum*. And an entry in their ledger is evidence, though the witness who produces it, did not make the entry; and the solicitor under their commission is compelled to produce the ledger containing the account between them and the person to whom they advanced the money, to shew that they knew him to be in an insolvent state. *Hawkins v. Howard and Gibbs.* Page 222
10. A bill of exchange given in payment to a person who becomes bankrupt, is a good payment, though the bill does not become payable till after the bankruptcy, if the party paying it did not know of the insolvency of the bankrupt. *Bennett and another, Assignees of Hall, v. Spackman.* 274
11. Interest at 20 per cent by stat. 49 G. 3, c. 121, in the case of assignees of a bankrupt wilfully retaining a balance, cannot be recovered in assumpsit on the common money counts. *Beresford v. Birch.* 373
12. The assignees of a bankrupt may maintain trover for bills of exchange sent by him to one of his creditors, after committing an act of bankruptcy, though he being a bill-broker had merely lent money on them, and had not either discounted or given the full value for them. *Hall, Assignee of Harris, v. Barnard.* 382
13. A bankrupt bought and represented himself as a dealer, but there was no distinct proof of his ever having sold—it ought to go to the jury.—But if there be distinct proof that

he bought to carry on a system of fraud, by making away with the goods, and not selling them, the judge will nonsuit the assignees, as it is not a trading. *Millikin v. Brandon.* Page 380

14. In trover by the assignees of a bankrupt, to recover property in his order and disposition at the time of the act of bankruptcy, no demand and refusal are necessary. *Soames v. Watts.* 400
15. An act of bankruptcy is committed by lying in prison for two months, though the party have the benefit of day-rules during that time. *Ibid.*
16. If assignees of a bankrupt have brought an action, and have attempted to prove one item of their demand, and fail, because they could not prove an act of bankruptcy sufficiently early, they cannot bring another action for that claim which they could not before succeed in. *Stafford v. Clark.* 403
17. And the record in the former action is evidence in the second action, without being pleaded, though not conclusive as an estoppel. *Ibid.*
18. An admission by a defendant, that he has received 30s. from a bankrupt after act of bankruptcy, will not support the count on an account stated with the assignees. *Ibid.*
19. If by a private act of Parliament a privilege of the sole making of a newly invented machine is vested in certain persons, with a proviso that it shall be forfeited in case it shall become vested in, or in trust for more than five persons, or their representatives, otherwise than by devise or succession," (reckoning executors and administrators only as the single persons they represent): Held, that if one of the persons become bankrupt, the right passes to his assignees; and that though there

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are more than five creditors, yet the assignees do not hold it in trust for more than five persons, otherwise than by devise or succession," within the meaning of the act.

Blagden v. Elsee. Page 558

20. The declarations of a bankrupt to a party with whom he is dealing, respecting his transactions in trade, are not evidence to prove the trading of such bankrupt. *Brimley v. King.* §46

BASTARD.

If the father of an illegitimate child consents to pay an annual sum for its support, he will be bound to continue to do so, or to provide for the child himself, or to give the most distinct notice of his intention to pay such annual sum no longer. *Cameron v. Baker.* 268

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BILL OF EXCHANGE.

See EVIDENCE, 15, 16.

1. A bill-broker cannot recover in an action against the acceptor of a bill indorsed generally, if he discounted it under circumstances which ought to have excited suspicion in his mind. *Gill v. Cubitt* and others. 163, 487

2. In an action on a bill of exchange, by indorsee against acceptor, the declarations of a former holder of the bill are evidence, if it can be shown that at that time he was holder of the bill, and was making such declarations to his own prejudice, and against his own interest. *Beckett v. Billing.* 230

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3. *Verdict.* That an averment in a

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4. Whether, after the indorsee of a dishonoured bill has brought actions against the indorser and the acceptor, his taking a cognovit of the acceptor for payment by instalments, is such a giving time as discharges the other parties to the bill.—*Quere. Lee v. Low.* 553 See, also, *Jay v. Warren.* 532

5. In a letter intended as a notice of dishonor of a bill, the dishonor ought to be stated as a specific fact; and it is not sufficient for the letter merely to demand the money of the drawer, and leave him to infer that the bill has been dishonored. *Hariley v. Cass.* 555

6. Whether notice of the dishonor of a bill after the bill has been actually dishonored, is good, though given on the very day on which the bill became due.—*Quere. Ibid.*

7. If one is sued on a bill of exchange, and it appears that the plaintiff has agreed with a third person, that if he will advance part of the sum for the defendant, he will take that in discharge of the whole debt, and such third person so advances it, that is a good defence to the action. *Webby v. Drake.* 557

8. If A. give an accommodation acceptance to B. which B. gives to C. as a security for some acceptance of his, and there accept-

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ances, when they become due, are paid by B. out of the produce of other acceptances given by C., but A.'s acceptance is not given up, though C. is desired not to present it, and A. informed that it will not be presented. Held, that the original transaction is continued, and A. not calling for the delivery up of the bill, must be presumed to have allowed it to remain as a security in the hands of C. for such of his acceptances as were subsequent to those for which it was at first given. *Woodroffe v. Hayne.* Page 600

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1. A letter from a surety for a collector to the obligees of his bond, stating that he will not be liable after the date of the letter, is no defence to an action on the bond for a deficit subsequent to the letter, if it be not pleaded specially. If it be pleaded—*Quare.* *Hough and another v. Warr.* 151
2. In assessing damages on a writ of inquiry, on a bond to replace stock, the fair rule is, to take the price of the stock on the day of the trial, or the day previous. *Harrison v. Harrison.* 412

BROKER.

1. If a broker makes a contract with the defendant for the purchase of goods, and delivers, by mistake, a bought note to each party, and does not mention his principal's (the buyer's) name, but makes a proper entry of it in his book; held that the buyer may maintain an action for

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2. If the duties of a sworn broker are executed in such a manner that no benefit results from them, he is not entitled to recover either his commission, or even a compensation for his trouble. *Hamond v. Holiday.* 384
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See EVIDENCE, 22.

CROSS EXAMINATION.

On indictment of a female prisoner for stealing from the person in a house you cannot ask the prosecutor in cross examination, "whether at that house any thing improper passed between him and the prisoner." *Rex v. Sarah Pitcher.* 85

CUSTODY OF DOCUMENTS.

The chest of a company kept by the clerk of the company, is proper custody for old documents relating to the company. But the private house of a deceased clerk of the company, is not proper custody for a convention *temp. Ed. 4*, between the Prince of Wales and the company. *The Mercers &c. Company of Shrewsbury v. Hart.* 113

CUTTING WITH INTENT TO MURDER.

To constitute the offence of cutting with intent to murder, it is not necessary that the wound should be near a vital part, or of such a nature, as to be likely to cause death. *Rex v. George Griffith.* 298

DAMAGES.

See POST-MASTER, 1.

DEED, PRODUCTION OF.

See PRODUCTION OF DEEDS.

688 DRIVING, NEGLIGENT,

DEFAMATION.

See SLANDER.

DELIVERY OF GOODS.

See FRAUDS, STATUTE OF, 1.

DEMISE.

See EVIDENCE, 17.

DEVIATION.

A ship going from London to Granada, and back, having been forty-eight hours in a port in Granada, has concluded her outward voyage. If she goes afterwards to other parts in the same Island to deliver her outward cargo, and receive contracts for homeward freight, and so is lost; this is a loss on her homeward voyage. *Miller v. Warre.* Page 237

DISSEISIN.

See FINE, 1.

DISTRESS.

Action on the stat. of Marlbridge, for an excessive distress. *Sells v. Hoare, Goodwyn, and others.* 28

DRIVING, NEGLIGENT.

1. In an action against a defendant for the injury occasioned by the careless driving of his servant, the plaintiff may recover for the injury done to his wife as well as himself, without bringing a separate action for each. *Alison v. Foister.* 21
2. In an action on the case, for the negligent driving of the defendant's servant, if it appear that the defendant holds himself out to the world as the owner of the cart, by suffering his name to remain painted on it, and over the door of the house of business to which it belonged, the action is maintainable against him, although it is proved that he

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had for some days ceased to be owner of the cart, and concerned in the business, having resigned both up to his former partner. *Stables v. Eley.* Page 614

3. If the declaration, in an action on the case against coach proprietors, for an injury received by the overturning of a coach, state, that it was their duty to carry the plaintiff safely for a certain hire, it does not mean to carry safely at all events, but the declaration will be sufficiently supported, by proof of the want of due care. *Harris v. Costar and others.* 636
4. In an action for an injury done to a stage-coach by a cart, the coachman is not a competent witness for the plaintiff, without a release. *Kerrison v. Coatsmorth.* 645

EJECTMENT.

See VARIANCE, 10 — WAVER, 2.

Ejectment cannot be brought against a person for setting up a stall, in a street. The remedy is by action of trespass, by the owner of the soil. *Doe, d. The Minister & Parish Officers of St. Julian, Shrewsbury, v. Cowley.* 123

ELOPEMENT.

See CONVERSION, 1.

EMBEZZLEMENT.

1. Held by the twelve judges, that if a servant receives money on his employers' account, and embezzles it, he is guilty of a felony, though his employers had no right to it, and were wrong doers in receiving it. *Rex v. Beacall, Rex v. Wellings.* 454
2. Held that if under an act of Parliament, the property in goods, chattels, debts, &c. are vested in certain directors of the poor, money and securities for money are not included. *Ibid.*

EVIDENCE.

3. In an indictment for embezzling money, it needs not be stated from whom the money was received. *Ibid.*
4. The servant of a corporation that embezzles their money, is guilty of felony, though not appointed under their common seal. *S. C.* 457

ENTRIES IN BOOKS OF A COMPANY, ASSESSMENTS, &c.

See EVIDENCE, 14.

ESTOPPEL.

See BANKRUPT, 18.

EVIDENCE.

See APOTHECARY, 2.—BANKRUPT, 2, 18, 20.—CARRIER, 1.—CONFES-
SION, 1, 2.—EXECUTORS, 1.—
FALSE REPRESENTATION, 1.—
FINE, 3.—FORGERY, 1.—GUAR-
ANTIE, 1.—HUSBAND & WIFE, 2,
3, 5.—IDENTITY, 1.—INSOL-
VENT, 2.—KING'S EVIDENCE, 1.
—LIBEL, 1, 2.—MANSLAUGHTER,
1. NOTICE, 2.—PRACTICE, 7, 11.
—SHIP, 1, 2.—SHIP'S REGIS-
TER, 2.—SLANDER, 1.—STOCK
JOBING.—TENANT.—TERM.—
THEATRE.—TITHES, 1, 2, 3.—
TROVER, 4.—VARIANCE, 2, 3.—
VETERINARY COLLEGE.

1. *Seemle*, That a witness is compe-
tent to prove that a debt due joint-
ly to him and the plaintiff is paid.
Evans v. Yeathard. 49, 336
2. An admission by a party, that *he*
is in possession of certain premises,
is no evidence of his possession on
any day antecedent to that on which
the admission is made. *Tindal v.*
Whitrow. 22
3. If an alteration has been made in
the plaintiff's pass book with his
bankers by some person at his
bankers, if he enquires there why
it is done, the answer he receives
from a person acting in the Bank-
ing-house as a clerk, is evidence in

EVIDENCE.

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- an action against the bankers.
Price v. Marsh and others. 60
4. If in conversation the opposite par-
ty states the contents of a written
paper, you may give such his de-
claration in evidence without pro-
ducing the paper.
If a witness has given a note
jointly with others for a sum of
money to indemnify the defendant
in the action, and his name has been
erased from the note by consent of
all parties to it, his competency is
restored, and he may be examined
for the defendant. *Sewell & Brett,*
assignees of *S. & J. Wright, v.*
Stubbs & Hancock. Page 73
5. Trover for bricks. Evidence that
men fetched them away saying
they were ordered by the defend-
ant; and evidence that the cart they
took them in, had on it the same
name as the defendant's, is not evi-
dence to go to the jury that the
defendant took them away. *Ever-*
est v. Wood. 75
6. *Seemle*, That a letter written by
a bankrupt, shortly after absent-
ing himself from home, is evi-
dence to shew his motive in going,
but not to prove the fact of his ab-
sence. *Rawson* and others, As-
signees of *Wilkinson, v. Haigh,*
Executor of *Haigh.* 77
7. On indictment for a conspiracy,
the letters of one of the defendants
to the other are, under certain cir-
cumstances, admissible in evidence
in his favor, to shew that he was
the dupe of the other, and not him-
self a participator in any fraud.
Rex v. Whitehead. 67
8. Corroboration of accomplice's evi-
dence needs not be on every mate-
rial point. *Rex v. Barnard* and
others. 88
9. A plaintiff is not at liberty to give
secondary evidence of the contents
of a document, if his witnesses
trace it to a person not connect-
ed with the cause, without calling
that person. *Freeman v. Arkell.*

10. A plaintiff may give secondary evidence of the contents of a written paper, if those in whose possession it was, proved that they had made diligent search for it, and could not find it. *Harper v. Cook.* 139
And see *Parkins v. Cobbet.* 282
11. A letter written by the indorser of a bill is evidence for the defendant in an action by indorsee against acceptor. *Coster v. Symons*, otherwise *Sherwood.* Page 148
12. In an action of covenant the attorney of a third person, who holds the deed as such, is not bound to produce it; but the plaintiff may go into secondary evidence.
An attested copy on 1s. stamp, is admissible as secondary evidence. *Ditcher v. Kenrick* 161
13. To make a defendant's card evidence, you must give him notice to produce his cards, and put in one as a copy, unless the one to be put in can be proved to have been given to the witness by the defendant himself. *Clark v. Capp.* 199
14. On an ejectment for a house, the land-tax assessment of the parish, in which the collector of taxes charges himself with the receipt of money from A. B. as tenant of a particular house, is evidence that A. B. was tenant at that time.
The books of an insurance company, in which they charge themselves with the receipt of a sum of money, as a premium to insure a particular house in the occupation of A. B. from fire, are also evidence of his occupation.
These entries are evidence because the party making them charges himself with the receipt of money. *Doe, dem. Smith, v. Cartwright.* 218
15. In an action by the indorsee of a bill, against the acceptor, the declaration of the drawer is admissible in evidence, to shew that the bill was obtained by fraud. The plaintiff must be, however, shewn

- to be in some way privy to the fraud. *Peckham v. Potter.* Page 232
But see *Barough v. White.* T. T. 1825.
16. In an action on a bill of exchange, by indorsee, against acceptor, the declarations of a former holder of the bill, are evidence, if it can be shewn that at that time he was holder of the bill, and was making such declarations to his own prejudice, and against his own interest. *Pocock v. Billing.* 230
17. If the issue is, whether the plaintiff is tenant of the defendant under a demise "for one year from the 23d of April, 1821, and thence afterwards from year to year," evidence that the plaintiff has paid the defendant rent, is not sufficient proof of the demise in issue. *Phillips v. Mosely* and others. 262
18. A paper written by a party is admissible in evidence against that party, though it is signed by a third person.
If a person goes and offers a sum of money, stating how much he offers, and holding the money twisted up in bank notes, in his hand, it is a sufficient tender; but if the sum had not been mentioned, *semble*, that it would not have been a good tender. *Alexander v. Brown.* 288
19. Medical persons are bound to reveal confidential communications, when called upon in courts of justice. *Rex v. Gibbons.* 97
20. The confession of a prisoner is evidence, though previous to it an inducement to confess had been held out by another person, if that person had no authority. *S. C.* *Ibid.*
21. A witness to prove the execution of a bond did not recollect whether at the time it was executed it had any seal; and he swore that he did not read the attestation, when he witnessed the execution: but there being a seal at the time of the trial,

- and the bond itself saying "sealed with our seals," it was held to be sufficient proof; but this evidence would not have been sufficient, if there had been no seal on the bond at the time of the trial. *Ball v. Taylor.* Page 417
22. On an inquiry in an action for crim. con. into the circumstances of the defendant, the executor of a deceased relation is bound to answer a question which requires him to state the amount of property the defendant acquired under the will of his testator. *Peter v. Hancock.* 375
23. If the defendant's counsel cross examines as to certain misrepresentations made towards the defendant, and deceptions practised on him, this is to be considered as notice to the plaintiff's counsel of the line of defence; and therefore if he has letters of the defendant tending to shew that he knew the real state of the facts, the plaintiff's counsel ought to give them in evidence, before the plaintiff's case is closed, and he will not be allowed to put them in evidence in reply. *Wharton v. Lewis.* 529
24. A party will not be allowed to go into evidence of the time when the counsel for the opposite party was retained, either by calling the counsel's clerk, or otherwise, as the retaining of counsel, falls within the rules respecting confidential communications. *Foot v. Hayne.* 545
25. If in an action for breach of promise of marriage, the defence set up is, that the defendant was induced to make the promise through misrepresentations made to him; and it is proved that the plaintiff knew that her father wrote letters to the defendant, in which he made statements respecting her; such letters are evidence for the defendant, though there is no proof

- that the plaintiff had read them, or was acquainted with their exact contents, but the plaintiff would not be considered answerable for the particular *expressions* contained in them. But a verbal representation made by the plaintiff's father (she not being present,) to a third person, who communicated it to the defendant, is not evidence. *Foot v. Hayne.* Page 546
26. You cannot ask a witness what the opposite party has said as to the contents of deeds executed by him, without such party has had notice to produce such deeds. *Bloxam v. Elsee.* 558
27. If the declaration in an action to recover the price of goods, sent for sale, on commission, allege that the defendant sold but did not account to the plaintiff, the plaintiff must prove that a sale actually took place, and it will not be presumed, even at a distance of twelve months after the delivery of the goods. *Elbourn v. Upjohn.* 572
28. Office copies of Chancery proceedings are not evidence on the trial of an issue out of the Court of Chancery, although they may have been read in evidence in that court. *Burnand v. Nerot.* 578
29. If there are parol negotiations which are afterwards reduced into writing, the writing must be looked to as shewing the final arrangement, but when a question arises as to whether a transaction has a usurious character, questions may be put to ascertain whether other matters, which do not appear on the face of it, were not previously talked of. *Sinclair v. Stevenson.* 582
30. If a paper be traced to the hands of an agent of a party in a suit, and notice has been given to the party to produce it, he is bound to do so; and the opposite party are not bound to call the agent as a witness; and

if the party has delivered it to the stamp office, to get certain duties allowed, and does not tell the party serving the notice to produce, of that circumstance, parol evidence of the contents may be given. *Ibid.*

31. If an agreement purport by the words attached to the signature of a particular person, to have been signed by that person, on the behalf of another, having an interest but not being a party, such person may be examined to prove that he signed in reality for a different person, who was named as a party, and whose signature was not to the agreement, and that the statement of his having signed for the first mentioned person, was written by mistake. *Rumball v. Wright.*

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32. A plaintiff may use as his evidence answers given to interrogatories exhibited by the defendant in the cause, but if he does so he cannot object that some of them are not evidence on account of their appearing to state the contents of written papers. *M'Intyre v. Lagard.*

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33. A horse was sold under a written warranty, contained in a receipt for the purchase money, which was given to the buyer's servant; the son of the seller (who was proved to have been present when the bargain was made, and to have acted at other times in his father's business, but never to have sold a horse by himself,) got the receipt back from the servant by a fraudulent representation: Held, in an action on the warranty against the father, that, under such circumstances, parol evidence of the contents could not be given, but that the son must be called as a witness—The son being called proved that he went for the receipt by desire of a person named T: the owner of the horse, for whom his father sold on commission, and

did not mention the subject to his father till he had obtained it;—This father then had possession of the receipt for a very short time, after which it was sent to T:—Held, that this fact did not vary the case, so as to let in the parol testimony. *Best v. Osborn.* Page 632

34. Evidence may be given by parol of material facts which transpired at an examination before commissioners of bankrupt, but which were not taken down in writing. *Rowland v. Ashby and another.* 649

EXECUTION.

If a party has goods on hire for a term, and the sheriff seizes them under an execution against such party, the owner of the goods may maintain an action on the case against the sheriff, if the sheriff sells the entire property of such goods: but, to support the action, he must shew, that, as soon as the goods were seized, he apprised the sheriff that the goods were lent for a term only; in order that the sheriff might know that he had only a right to sell the qualified property that the hirer had in the goods. *Dean v. Whittaker & another, Sheriffs of Middlesex.* 847

EXECUTORS.

1. In answer to a plea of *plene administravit*, proof that the deceased's property was sworn under a certain sum, is *prima facie* evidence of assets to the amount of the smallest sum that would pay the same probate duty as the sum sworn to. *Curtis v. Hunt and others.* 180
2. If two persons, who are executors jointly with a third, bring an action in their own persons, and not as executors, on a contract made with those two, the third having taken no part in the making of the contract: such action can be

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maintained by those two, without the third joining. *Brassington and another v. Ault*. Page 302

EXPENSES.

1. A witness, who is subpoenaed by a defendant indicted for a conspiracy, is compellable to give evidence, though such defendant refuses to pay his expenses; and the indictment having been removed by *certiorari*, and coming down to the assizes as a civil record, does not make any difference as to this. *Rex v. Cooke & Jenkinson*. 322
2. Expenses of witness going to identify stolen property, disallowed. *Rex v. Millington*. 83
3. In frivolous cases of felony, the judge will not allow the prosecutor's expenses, though he was bound over by a magistrate. *Rex v. Powell*. 98

FALSE REPRESENTATION.

Declaration in *tort*, stating that the defendant, on the sale of Teneriffe Barilla, asserted that 7½ cwt. would produce a ton of soap, well knowing it would not do so, is not supported by evidence that he said he had made 7 tons of soap out of 81 cwt. and no proof of the *scienter*. *Horncastle and another v. Mont*. 166

FALSE PRETENCES.

If one professes to sell an interest in property, and receives the purchase-money, the vendee taking the usual covenant for title, and it turn out that the vendor has in fact previously sold his interest in the property to a third person. This is not sufficient to support an indictment for obtaining money by false pretences. *Rex v. Codrington*. 661

FINE.

1. A fine with proclamations by a

FORGERY.

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disseminator, bars ejectments, unless there has been an actual entry to avoid its operation. *Poe, dem. Anderson, v. Turner*. Page 91

2. A second son, who was living with his father at the time of his death, holding possession of his father's house, levies a fine with proclamations: the eldest son need not make an actual entry to avoid this fine. *Doe, dem. Davis, v. Davis*. 130

3. If in a fine there be a patent ambiguity, the fine is void; but if there is a latent ambiguity, it may be explained by evidence.

If a fine be levied of twelve houses, it revokes a previous will *quoad* those houses; but evidence may be given to shew that the comoror had nineteen houses, and that a particular twelve were meant by the fine. *Doe, dem. Bulkeley, v. Wilford*. 284

FORFEITURE.

See LEASE, 1.

FORGERY.

1. A person whose name is forged, is a competent witness to prove the forgery, if released. *Rex v. Thomas Pigeon*. 98
2. If a banker of a supposed acceptor of a forged bill discount it for the agent of one of the indorsers, on the discovery of the forgery, the banker so discounting may recover back the money he paid on the bill, notwithstanding he was the banker of the supposed acceptor, and therefore might be taken to know his hand-writing. *Fuller and others v. Smith and another*. 197
3. On an indictment for forging the names of two joint acceptors, one release by the holder, for valuable consideration, to both of them jointly, is sufficient to make them competent witnesses to prove the forge-

ry; and such release requires but one stamp. *Rex v. Bayley*. 435

4. A release to one of two joint acceptors, inures to discharge both.

Ibid.

5. A power of attorney under seal, to transfer stock in the public funds, is a deed; and knowingly uttering a forged one is a capital offence, under stat. 2 Geo. 2, c. 25, s. 1. *Rex v. Fauntleroy*. 421

FRAUD.

See LIEN.

If a horse is sold with a warranty, any fraud at the time of the sale will avoid the sale, though it is not on any point included in the warranty. *Steward v. Coesvelt*. 23

FRAUDS, STATUTE OF.

1. The plaintiff agreed by parol, that, if the defendant would employ his ship to carry corn, he would bring him coals at a stipulated price. This contract is not within the Statute of Frauds, and need not be in writing; nor is part delivery, or part payment, necessary to make it binding. *Cobbold v. Caston*. 51
2. That part of the Statute of Frauds, which directs certain agreements to be in writing, will be taken notice of by the Court on the trial of an issue out of the Court of Chancery. However, if the jury should think that there was an agreement made which was not in writing, the Judge will indorse that finding on the postea as special matter. *Bernard and another v. Nerof*. 578

GAME.

1. On an information filed in the Crown Office for game penalties, notice to a defendant in custody, indorsed on a copy of the information, to appear and plead, or demur; or a plea and appearance will be entered under the Stat. 48 Geo. 3, c. 58, is not good; as that stat. does not apply to informations of this sort. On such an information, if a

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verdict passes in favor of one defendant, and against another, the acquitted defendant is not entitled to his costs.

Whether, on the trial of such information, it is necessary that a defendant in custody, who has not employed either attorney or counsel, should be brought into court at the time of the trial? And if it is necessary that he should, whether he should be brought up by an order of the Judge at *Nisi Prius*, or by *habeas corpus*.—*Quære. Davies v. Binst, Cooke, and others*. Pages 439, 559

GOODS NOT ACCORDING TO ORDER.

If goods are supplied not according to the order for them, the buyer is bound to return them within a reasonable time, or he will be bound to pay for them. *Milner & al. v. Tucker*. 15

GUARDIAN.

See CONVERSION, 1.

GUARANTIE.

1. In an action on a guarantie undertaking "to make provision for the repayment" of a sum lent to a third person, the plaintiff must give some proof that no provision has been made by the defendant, or he will be nonsuited. Slight proof, however, is sufficient. *Garrett v. Handley*. 217, 483
2. Whether an undertaking to pay for work to be done, if the plaintiff will advance money, is a guarantie. *Quære. Parkins v. Moravia*. 376, 507

HIGHWAY.

1. In an indictment for obstructing a common highway, the highway may be laid as a common highway for carts, carriages, &c. though it has always been arched over; provided it is capable of being used by all ordinary carriages; and notwith-

HUSBAND AND WIFE.

standing the arch-way be not sufficiently high to permit road wag-gons and other carriages of unusual dimensions to pass under it. *Rez v. Lynn & Debney. Page 527*

HOUSEBREAKING.

1. To constitute the offence of breaking into a dwelling house in the day-time, (no person being therein), it must be proved, that the breaking took place at a time of day, when there was sufficient day-light to distinguish a person's features. *Rez v. Caleb Tandy. 297.*

HUSBAND AND WIFE.

See DRIVING, NEGLIGENT 1.

1. Agreements by husband and wife to live separate, are legal. If you intend to set up adultery to avoid such agreement, you ought to plead it. If the parties live together after the agreement, that will put an end to it. The wife's conduct towards her husband on coming back is evidence on action by her trustee for the separate maintenance. *Scholey v. Goodman. 36*
2. If larceny be jointly committed by husband and wife, the wife is entitled to be acquitted as under coercion: the woman being indicted as "the wife of A. B." is sufficient proof that she is so for this purpose. *Rez v. Knight and his wife. 116*
3. Husband and wife trading as partners in Spain, cannot sue in our courts without proof, that, by the law of Spain, a feme covert is allowed to trade. Whether on such proof an action could be maintained by both.—*Quære. Cosio & Pineyro v. De Bernales. 266*
4. The jury may judge whether goods furnished to a wife are suitable to her husband's rank. *Montague v. Espinasse. 356, 502*
5. A husband is not liable for goods supplied to his wife while she is living with him, without proof of his

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assent to the order. If she is wrongfully put away, he is liable for her necessaries, if he neglects to find them for her. *Ibid.*

6. In *assumpsit* for board and lodging supplied to the defendant's wife, if the defence is the adultery of the wife, a statement made by her, confessing her adultery, which statement was made immediately previous to her husband turning her out of doors, is admissible in evidence on the part of the husband; and so are letters from different men, found by him at that time in her writing desk. *Walton v. Green. 621*

IDENTITY.

- A person sends letters to S. F. of Plymouth Dock, and receives answers to them; such answers are admissible in evidence against a defendant, his name being S. F. and it being proved by a person who knew the principal residents of Plymouth Dock, and knew of no other person named S. F.; this being considered sufficient *prima facie* evidence that they came from him; and if they were not of his handwriting, it lay on him to shew that. *Harrington v. Fry. 289*

IMPRISONMENT.

1. If a constable is preventing a breach of the peace, and any person stands in his way with intent to hinder him from doing so, the constable is justified in taking such person into custody, but not in giving him a blow. *Levy v. Edwards. 40*
2. *Semble*, that a gaoler, bringing a prisoner out of his county to be present at the trial of an information on the game laws, in which he is defendant, without having a *habeas corpus*, or judge's order, for that purpose, is liable to an action for false imprisonment. *Bint v. Lander. 659*

INDICTMENT.

See **EMBEZZLEMENT**.—PRACTICE,
9, 10.

1. The names of the grand jurors, who found an indictment removed by *certiorari*, need not be inserted in the caption. *Rex v. Davis*. Page 470
2. If two persons are jointly indicted for obstructing a highway, and no joint act appears, the judge, as soon as the case for the prosecution is closed, will put the prosecutor's counsel to elect which he will proceed against, and take an acquittal for the other. *Rex v. Lynn & Debney*. 528

INFANCY.

1. A father is not liable to pay for clothes furnished to his son, though under age, without some proof of a contract on his part, either express or implied. *Blackburn v. Mackey*. 1
Fluck v. Tollemache, S. P. 5
2. An infant is suable for so much of goods supplied to him to trade with as were used as necessities in his own family. *Turberville v. Whitehouse*. 94

INSOLVENT.

1. An insolvent cannot maintain trover for plate, though his assignee does not interfere to prevent him. *Lea v. Telfer*. 146
2. In an action by the assignees of an insolvent debtor to recover money from one of the creditors, which ought to have gone to the general fund, the insolvent is not a competent witness on the part of the plaintiff. *Rudge and another v. Ferguson*. 253

INSURANCE.

1. Policy of insurance on *ship or ships*, warranted to sail from Demerara on or before the first of August. The ship (a small one) sailed on that day $2\frac{1}{2}$ miles, and then anchored at a place nearer the town than large ships can come. This is a

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"sailing from Demerara" within the policy. *Lang v. Anderdon*.
Pages 171, 480

2. If a ship is so injured by perils of the seas, that she is rendered wholly unfit for sea, and cannot be repaired but at a greater expense than building a new ship, the owner may recover for a total loss, though the ship, in the state she is reduced to, is sold with her registry. *Cambridge v. Anderdon*. 213
3. A ship going from London to Granada and back, having been forty-eight hours in a port in Granada, has concluded her outward voyage. If she goes afterwards to other parts in the same island to deliver outward cargo, and receive contracts for homeward freight, and so is lost, this is a loss on her homeward voyage.

A ship-owner, who has entered into contracts for freight, has an insurable interest in the freight, though the contracts are not in writing. *Miller v. Warre*. 237

4. A creditor insures the life of his debtor, who makes false representations of his health, without the creditor's knowledge of the falsity. The policy is vitiated, though the insured died of a disease he was not then afflicted with. *Maynard v. Rhode, esq.* 360

ISSUE OUT OF CHANCERY.

See **FRAUDS**, STATUTE OF 2.—EVIDENCE, 28.

JOINT FUND.

If money be paid by two persons for the benefit of a third, where they ought to bring a joint action for the whole sum, and where each a separate action for the sum he has advanced. *Quærs. May and others v. May and others*. 44, 336

JOINT STOCK COMPANIES.

1. An agreement, relative to the buying of shares in a proposed joint stock

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company unauthorized by statute or charter, is illegal, and cannot be enforced. *Josephs v. Pebrer*. 341, 507

2. The broker who bought the shares cannot recover his money of his principal. *Ibid*.

JUDGMENT.

As long as a judgment exists, it protects those who seize property under an execution founded on it; and, if the judgment and execution are set aside, no action lies against the sheriff for any thing he did under it, while it remained in existence. *Ives v. Lucas & Thompson*. 7

JURORS, GRAND.

See INDICTMENT, 1.

JURY, SPECIAL.

See PRACTICE, 12.

JUSTICE OF THE PEACE.

1. He is entitled to notice, if he acted under a belief only of jurisdiction. *Jones v. Williams*. 459
2. Aldermen by charter empowered to appoint deputies. Though they be justices themselves, *quá* aldermen, such deputies are not justices. And therefore these deputies are not entitled to notice. Whether the stat. 4 Geo. 4, c. 34 gives justices authority over menial servants, as such servants.—*Quære*. If a person claims a right to act as justice, he is entitled to notice, though the grounds on which the plaintiff goes is a denial of such right. *Jones v. Williams*. 459, 669

KING'S EVIDENCE.

Method of moving to admit king's evidence. *Rex v. Barnard, Farmer, & Bedford*. 87, in the note.

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LANDLORD OF LODGINGS.

If the landlord of lodgings enter into or use the lodgings while his tenant is in possession of them, it deprives the landlord of his right to rent: but if the tenant has during the tenancy abandoned the possession, and the landlord lights fires in the rooms, and even makes some use of such fires, he will not by this lose his right to rent. *Griffith v. Hodges*. Page 419

LARCENY.

If a person stealing other property, take a horse, not with intent to steal it, but only to get off more conveniently with the other property, such taking of the horse is not a felony. *Rex v. Crump*. 658

LEASE.

1. If a lessor, after a forfeiture, advises a person to purchase the term of his lessee, he cannot maintain an ejectment for such forfeiture against that purchaser; but otherwise, if the party have an interest, e. g. an annuity secured on the premises, and the advice is, to "take to them" merely. *Doe, dem. Sore, v. Eykins*. 154
2. The depositing a lease in the hands of brewers for money lent, is not within the meaning of a proviso for re-entry, which is to take effect if the lessee, his executors, &c. should "grant any underlease, or assign, transfer, set over, or otherwise part with the lease or premises without licence. *Doe, dem. Pitt, v. Hogg*. 160

LIBEL.

1. If a libel is justified as true, and in the plea each specific statement is averred to be true; if the defendant does not prove each statement to be true, the plea is not proved, though he prove facts of the same kind. *Weaver v. Lloyd*. 295

2. In an action for a libel, if a letter of the defendant is read, which refers to an account of the transaction the libel relates to, which has appeared in a newspaper, that newspaper may be given in evidence. *Idem.* Page 296

LICENCE, LEAVE AND (BY PAROL).

1. Leave and licence to build a cottage on a common given by a commoner by parol. He can bring no action for the encroachment, though no sufficient common is left. *Harvey v. Reynolds.* 141
2. In trespass *quare clausum fregit* on several days; plea, leave and licence to the whole: if some of the trespasses were committed after the licence was revoked, the plaintiff need not new assign. If the plaintiff is tenant of A. and has agreed that A. shall give three persons licence to sport over the lands, and the defendant has such a licence from A., such licence will not support the plea of leave and licence by the plaintiff. *Hayward v. Grant.* 448, 677

LIEN.

A stable-keeper may, by special agreement, acquire a lien on horses for their keep; and if the owner, to defeat such lien, gets them away by fraud, the stable-keeper has a right to get possession of them; and for so doing he will not be answerable in trover; for the lien is not put an end to by the parting with the possession under such circumstances. *Wallace v. Woodgate.* 575

LIMITATIONS, STATUTE OF.

If a party, when he is arrested, say, "I shall go to my attorney's and pay the debt, and settle it," this is sufficient to take the case out of the statute of limitations. *Triggs, administratrix, v. Nennham.* 631

MANSLAUGHTER.

MALICIOUS PROSECUTION.

In action for malicious prosecution, the plaintiff may call one of the grand jury to prove that the defendant was prosecutor on the indictment. *Freeman v. Arkell.* 137

MANSLAUGHTER.

1. An indictment for manslaughter, charging that the prisoner did *compel and force* A. B. and C. D., who were working at a certain windlass, to leave the said windlass; and by such *compulsion and force*, &c. the deceased was killed; is not supported by evidence that the prisoner was working the windlass with A. B. and C. D., and that by his going away they were not strong enough to work it, and so they let it go; because the words "compel and force" must be taken to mean active force. *Rex v. Lloyd.* 301
2. A person set to watch a yard or garden, is not justified in shooting one who comes into it in the night, even if he should see the party go into his master's hen-roost. But if, from the conduct of the party, he has fair ground for believing his own life in actual and immediate danger, he is justified in shooting him. *Rex v. Scully.* 319
3. If a person is driving a cart at an unusually rapid pace, and drives over another and kills him; he is guilty of manslaughter, though he called to the deceased to get out of the way, and he might have done so, if he had not been drunk. *Rex v. Walker.* 320
4. If two persons quarrel and fight—one runs away, and, when the other overtakes him, he pulls out his knife and stabs him—if death ensues, it is manslaughter: if he had drawn his knife before the conflict began, it would have been murder. *Rex Kessal.* 437

MARRIAGE.

A marriage in Ireland by a clergyman of the Established Church, is good, though it takes place in a private room, without any special licence. *Smith v. Maxwell.* 271

MARRIAGE, BREACH OF PROMISE OF.

See EVIDENCE, 23, 24, 25.

1. Proof of loose character of the woman goes in bar of the action for it, except the man was aware of it at the time of the promise. In mitigation of damages, the man may go into evidence that his relatives disliked the match; and if his father is an incompetent witness, because he employed the attorney to conduct the defence, a witness will be allowed to prove that he heard the father express to the defendant his dislike. *Irving v. Greenwood.* 350
2. In an action for breach of promise of marriage, if it appears that the defendant was induced to make the promise, or to continue the connection, either by misrepresentation, or wilful suppression of the real state of the circumstances of the family, and previous life of the plaintiff, this goes in bar of the action, and not to the damages only. *Wharton v. Lewis.* 529

MISDEMEANOR.

See EXPENSES, 1.

MONEY HAD AND RECEIVED.

1. If a contract is broken, an action for money had and received will not lie for money paid under it; an action for breach of contract is the proper remedy: but if the contract has been rescinded, it is otherwise. *Davis v. Street.* 18
2. In an action for money paid, laid out, and expended, the plaintiff must prove some authority from

the defendant to pay the money. *Tappin v. Broster.* Page 112

3. If several persons are jointly engaged in raising money for a bubble, one cannot maintain an action for money had and received against another of them, for the money so raised. *MacGregor v. Lowe.* 200

MURDER.

See MANSLAUGHTER, 4.

NEGLIGENCE OF COACH PROPRIETORS.

See COACH PROPRIETORS.

NEGLIGENCE OF SERVANTS.

See TROVER, 2.

NEW ASSIGNMENT.

See ASSAULT, 2, 3.

NOTICE.

See BILL OF EXCHANGE, 5.—SURETY.

1. If a defendant is served with a notice to produce letters four days before the trial, this is sufficient, though it is objected that he is a foreigner, and has only been in England since the time when the letters were received by him; and therefore he might have left them abroad. *Drabble v. Donner.* 188
2. To make a defendant's card evidence, you must give him notice to produce his cards and put in one as a copy; unless the one to be put in can be proved to have been given to the witness by the defendant himself. *Clark v. Capp.* 199
3. Notice to the principal is, in law, notice to all his agents; therefore, if stage coach proprietors have given the usual 5*l.* notice, to the principal in London, though a parcel sent by their traveller, who did not know of the notice, containing money, was lost, the coach proprietors are not responsible. *Mayhew v. Eames.* 550

700 PARTNER RETIRING

ORDER.

If goods are supplied not conformably to the order for them, the buyer is bound to return them within a reasonable time, or he will be bound to pay for them. *Milner et al. v. Tucker.* Page 15

OWNERSHIP REPUTED.

1. If a man has goods in his possession as the servant of his father, for the purpose of carrying on a trade for the father's benefit only, they will not pass to the son's assignees under the stat. of 21 Jac. 1, c. 19. *Stafford et al. assignees of Clark Junr. v. Clark, Senr.* 24
2. If the trading &c. of a bankrupt is proved by the proceedings under the commission, the counsel for the opposite party have no right to look at any of the proceedings but such as have been used for that purpose. *Idem.* 26
3. If a person sends his servant to sell his deals at another's wharf, these deals do not pass to the assignees of the owner of the wharf as goods in his order and disposition, under the stat. 21 Jac. 1, c. 19. *Boddy v. Esdaile and others, Assignees of Triggs.* 62

PARTNER, OSTENSIBLE.

An ostensible partner proved not to be really a partner, needs not join in actions on contracts with the supposed firm. *Davenport v. Rackstrow.* 89

PARTNER RETIRING.

Whether the funds of a former partner in a firm are liable to a person knowingly leaving his balance in the hands of the altered firm; and having declared his confidence in the new firm, &c. *Quere. David v. Ellis.* 268

PAYMENT.

PATENT.

See BANKRUPT, 19.

1. If a patent be taken out by a British subject to hold for an alien enemy at the time; whether that will annul the patent without suing out a sci. fa. *Quere. Bloxam v. Elsec.* 558
2. A specification by words and drawings annexed is good. *Ibid.*

PAUPERIS FORMA.

If one is admitted to defend a suit in Chancery in *forma pauperis*, his solicitor can only recover of him money actually paid out of pocket for the defence of the suit. *Phillips v. Baker.* 533

PAYMASTER.

The plaintiff being the representative of a deceased officer of artillery, of which corp the defendants were paymasters, they delivered to him an account current in which they acknowledged themselves to have received from the year 1806, to the year 1820, pay according to an increased rate allowed by an order of the Board of Ordnance, dated August 28, 1806. Held that they could not, in 1821, be permitted to say that this admission was by mistake; as, in 1816, the Board of Ordnance had announced that by the true construction of the order of 1806, persons in the situation of the deceased were not entitled to the benefit of it; this announcement of the board having never been communicated to the deceased by the defendants, till the year 1821. *Skyring v. Greenwood.* 517

PAYMENT.

If money is paid by two persons for the benefit of a third, where they ought to bring a joint action for the whole sum, and where each a sepa-

PERJURY.

rate action for the sum he has advanced—*Quære. May and others v. May and others. Pages 44, 336*

PENALTY.

The penalty of twenty pounds per chaldron for every chaldron of coals of one sort, sold as and for another sort, inflicted by the statute, 47 Geo. 3, sess. 2, c. 68, is a penalty exceeding 20*l.* and therefore recoverable in the superior Courts, under s. 150 of that statute. *Reeve who sues, &c. v. Pool.* 622

PERJURY.

1. An indictment for perjury may be supported against a marksman, for swearing falsely in an affidavit, though it would not be receivable in the Court it was sworn in, because the *jurat* did not state that it had been read over to the person swearing to it: but the person administering the oath, must prove that the person swearing it, in fact understood its contents.

The perjury is complete at the time of the swearing of the affidavit; and whether it is receivable in the court or not is immaterial, if the reason why it is not receivable is that some formal regulation is not complied with. *Rex v. Hailey.* 258

2. You cannot convict for perjury on an affidavit, if it refers to a former affidavit, which you are not in condition to prove. *Idem.* 259

3. On an indictment for perjury, the proving the handwriting of the signature of the person who administered the oath is sufficient proof that it was sworn; and if the place at which it was sworn is mentioned in the *jurat*, that is sufficient evidence that it was sworn at that place. *Rex v. Spencer.* 260

4. If an insolvent debtor has sworn that his schedule contains a full, true, and perfect account of all

POOR.

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debts owing to him at the time of his petitioning for discharge, an assignment of perjury on that oath, stating, that whereas, in truth and in fact, the said schedule did not contain a full, true, and perfect account, &c. (in the words of the oath) is too general. It ought to state what debt he is charged with omitting. *Rex v. Hepper.* 608

PLEADING.

See BILL OF EXCHANGE, 3.—DRIVING, NEGLIGENCE, 3.—EMBEZZLEMENT, 3.—HUSBAND AND WIFE, 2.—SALE OR RETURN.—SURETY.—VARIANCE, 1.

1. If defendants justify shooting a dog by pleading that he attacked them, and that he was accustomed to attack and bite mankind, the plaintiff may call witnesses to prove the general quietness of the dog. *Clark v. Webster & Salt.* 104

2. In an action by a passenger in a coach, against the owner for an injury done him by the coach overturning; if the declaration states that the servants of the defendant negligently "*drove, conducted, and managed, the Coach.*" The plaintiff cannot recover, if the negligence was in sending out an insufficient coach. *Mayor v. Humphries.* 251

3. In a declaration for usury, the day from which the forbearance is to commence is material, and must be truly stated. If no day is stated, it will be bad. If a wrong day is laid, it will be a fatal variance. *Partridge v. Coates.* 534

POOR.

1. A deputy overseer, or even a mere stranger directing a surgeon to attend a poor man, is liable to pay the surgeon. *Walling v. Walters.* 152

2. Whether an overseer is liable to pay a surgeon who attends a pau-

per without a retainer.—*Quære*.
A deputy overseer is not. *S.C. Ib.*

POSTMASTER.

If a postmaster has agreed to deliver letters in a particular mode, and by mistake does not deliver one for two days, that letter containing a returned bill, he is not liable in damages for the amount of the bill, if the plaintiff could give notice of dishonour in time, if he sent a special messenger, though too late to do so by the post. *Hordern and another v. Dalton.* 181

PRACTICE.

See TALES, 1, 2.

1. Rule to shew cause (granted) for a new trial, because the case came on by surprise. *Lee v. Joseph.* 46, 336
2. If a cause has been made a special jury cause, but the special jury have not been summoned, the Ld. Ch. J. will take it at the end of the day on which it would have been tried by the special jury, and not let it remain till all the special juries in the list are gone through. *Archer v. Bamford.* 64
3. In debt on bond, the only plea being *solvit ad diem*, the execution of the bond is admitted, and the defendant begins. *Sandford v. Hunt.* 118
4. In civil causes the judge will allow the plaintiff to recall a witness after he has closed his case, to prove a point omitted to be proved in the proper place. *Brown, Esq. v. Giles.* 118
5. On the trial of *quo warranto* informations, if the affirmative of the issues is on the defendant, he begins; but if it is on the relator, he begins. *Rex v. Yeates.* 323
6. If two defendants are indicted for a conspiracy, the judge will, under certain circumstances, permit one

of the defendants, who conducts his own case, to cross-examine before the counsel for the other defendant; and, after the conclusion of the prosecutor's case, to address the jury, and call his witnesses, before the counsel for the other defendant opens his case. *Rex v. Cooke and Jenkinson.* 321

7. If affirmative pleas are pleaded with the general issue, the plaintiff may give in evidence any matter that goes to destroy the justifications pleaded, by way of anticipation of the defence; or he may prove his facts, and trust to answering the defendant's justification by evidence in reply; but if he does this, he will be restricted to such evidence as goes exactly to answer the case attempted to be made out by defendant in support of his pleas. *Pierpoint v. Shapland.* 447
8. When a copy of an agreement sued upon is delivered to the defendant in pursuance of a judge's order for that purpose; the judge will, in general, make it a part of that order that the defendant shall make no objection to the stamp. *Price v. Boulby.* 466
9. Indictment stating issue joined at the "General Sessions, &c., Glamorgan, before, &c." of the court of Great Sessions, is not proved by shewing issue joined at the "Great Sessions." *Rex v. Thomas.* 472
10. If in ejectment it is laid that "John Doe, dem. W. R. and D. T., was plaintiff;" and it appears that John Doe was plaintiff on the joint demise, and also in two several demises, it is a fatal variance; as this is a description of how he was plaintiff, and not an allegation only. *Ibid.*
11. The judge at the trial of a case cannot order any paper to be impounded which is not given in evidence. It is not enough that it

should be in court in the possession of one of the witnesses. *Rex v. Clifford.* Page 521

12. If a case be not gone into, the judge will not certify that it was a fit cause to be tried by a special jury, merely because the declaration is for large penalties, and persons of rank are called on their subpoenas. *Orme v. Crookford.* 537

13. On the trial of an indictment for perjury, the judge will allow the defendant to address the jury and cross-examine his witnesses, and his counsel to argue points of law and suggest questions to him for the cross-examination of the witnesses. *Rex v. Parkins.* 548

14. If, after a witness for defendant has been examined as to a conversation which he put down in writing, and has not been asked to produce the memorandum, and the plaintiff's counsel in reply has observed upon its absence; the judge, for his own satisfaction, asks the witness for the paper, and it is produced; such production will not entitle the plaintiff's counsel to address the jury again upon it. *Dowling v. Finigan.* 587

15. The notice of a defendant's intention to try a traverse, is not a condition precedent to its being tried; and the prosecutor, if he appears, aids all defects in it; and he is not allowed to appear for the purpose of objecting to the notice. *Rex v. Hobby.* 660

16. If the court has set aside the judgment against the casual ejector, on the present defendant's undertaking to enter in the consent rule, plead, and take short notice of trial for the adjourned sittings. The adjournment day being Monday, April 11th, and the defendant having pleaded on Saturday, the Lord Chief Justice, on application being made on the 11th, allowed the cause to be entered. *Doe. d. of Crawshaw v. Shepherd.* 620

PRINCIPAL AND AGENT.

See AGENT.

PRODUCTION OF DEEDS.

If A. has lent money on a deed of assignment, which is deposited in his hands, he is not compellable to produce it on the part of the assignor, in an action between the assignor and a third person. *Schlenker v. Mosey* and another. 178

PROMISSORY NOTE.

1. What notes are negotiable or transferable within the statute of 17 Geo. 3, c. 30.—*Quære. Quarterman & al. v. Green & al.* 92
2. Whether a plaintiff can recover on an instrument in the terms "Received of Mr. D. B. 100*l.*, which I promise to pay on demand, with lawful interest, J. D."—on an agreement-stamp, and a 3*d* receipt-stamp.—*Quære. Whether one admission of liability to pay a debt can be applied to two distinct causes of action between the same parties.—Quære. Green v. Davis.* 451, 452

PROBANDI, ONUS.

See APOTHECARY, 3.

PROMOTIONS—145, 232.

PROSECUTION.

See EXPENSES, 2, 3.

QUO WARRANTO.

See PRACTICE, 5.

RELEASE.

See FORGERY, 3, 4.—WITNESS, 10, 16.

RENT.

See LANDLORD.

ROBBERY.

1. To constitute the crime of highway-robbery, the force used must be force with intent to overpower the party, and prevent his resistance; and if the force used is not with that intent, but only to get possession of the property, it is not highway-robbery. *Rex v. Gosil.*

Page 304

2. It is equally a robbery to extort money from a person by threatening to accuse him of an unnatural offence, whether he has been guilty of it or not. *Rex v. Gardner.*

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SALE OR RETURN.

- If goods are supplied on sale or return within a year; after the year is expired, if the goods have not been returned, the seller may recover the price on a common count for goods sold and delivered, without any special count. *Harrison v. Allen.*

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SEDUCTION.

See WITNESS, 4.

SERJEANT'S INN.

- Rateability of Serjeant's Inn, Chancery Lane. *Lens, Esq. v. Browne and another.*

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SERVANT.

1. A servant's invention belongs not to his master but to himself. *Bloxam v. Elsee.*
2. If a master employs a skilful person for the express purpose of invention, sometimes it is otherwise. *Bloxam v. Elsee.*

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SET-OFF.

1. A defendant cannot reduce a plaintiff's demand for goods sold, by producing a debtor and creditor

account in the hand-writing of the plaintiff's clerk, unless he has pleaded or given notice of set-off. *Fothergill and others v. Jones.*

Page 133

2. In an action for use and occupation of stables, the plaintiff and defendant having formerly been connected in a stage-coach concern, weekly accounts delivered by the plaintiff to the defendant, by which it appeared that the plaintiff received the profits for the purpose of dividing them, and which stated the sum due to the defendant for the week, are not evidence of proper matter of set-off. To become matter of set-off the balance in the partnership account must be final. *Fromont v. Coupland.*

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SHERIFF.

See EXECUTION.—JUDGMENT.

1. If after a sheriff has returned to a *fi. fa.* for \$011., that he has levied only 13*l.*, the plaintiff goes and receives that 13*l.*, he cannot maintain an action for a false return. *Beynon v. Garratt and Venables.*
2. If the plaintiff has bought sails of the sheriff, under an execution, with a knowledge that they are deposited at a sail-maker's, and does not apply for a delivery till after the time when the sheriff is bound to pay over the money; he can maintain no action against the sheriff if the sail-maker refuses to deliver them up. *Duncan v. Garratt and another.*
3. The issue that R. and Y. became bail at the request of the sheriff, is proved by shewing that they became bail at the request of the sheriff's officer, to prevent the sheriff from being fixed. *Evans v. Sweet.*
4. If a levy is made by the sheriff, and the proceeds paid to the exe-

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SHIP.

cution creditor, and trover is brought by the assignees of the person against whom the execution issued, he having become bankrupt: if the sheriff suffers judgment in such action to go by default, he cannot recover back from the execution creditor the money he has paid him, if he (the sheriff) could have made a good defence to the action brought against him by the assignees, even though he gave notice to the execution creditor that he would defend the action if the execution creditor would furnish the grounds and means for his so doing. *Austin v. Ward.* 370, 507

SHIP.

1. In action for negligently steering a ship, whereby she was wrecked, and plaintiff lost his passage in her—no evidence can be given of a specific act of negligence, which is not the foundation of the action. You may give evidence that the captain had often expressed his conviction that the officer to whom he gave charge of the ship was incompetent for that situation. You may call experienced nautical men, and ask them whether, in their judgment, particular facts, which have been proved, amount to gross negligence. *Malton v. Nesbit and another.* 70
2. A book kept at the India House from returns given on oath under the statute 53 George 3, c. 155, of the number of passengers going on board India ships is evidence.

An agreement between an East India ship-owner and one of his captains, to exchange commands with another captain, is not illegal; and such an exchange of commands is a sufficient consideration for either party in an action on other terms of such an agreement.

The statute 49 George 3, c. 126,

SHIPPING-NOTE. 705

relative to the sale of offices under the East India Company, applies only to their public offices, and not to the commands of their ships; these being merely in their trade as merchants. Per BURROUGH, J. *Richardson v. Mellish.*

Page 241

3. A person is not liable for goods supplied for the use of a ship, unless he either is owner, or has held himself out as such, or has made an express promise to pay, or has received profit from the ship. *Harrington v. Fry.* 289

SHIP'S REGISTER.

1. The registered owner of a ship is *prima facie* liable for goods furnished for the use of that ship, but such presumption of liability may be rebutted by evidence of the credit having been given to others. *Cox & others v. Reid & another.* 602
2. If there be a bill of sale of a ship-note containing any qualification, and such unqualified bill of sale be entered properly on the register, and there be also a deed of defeasance, making void such bill of sale on the payment of a sum of money. The deed of defeasance may be given in evidence on the part of the defendant charged in an action for goods, as the registered owner, in order to shew the qualified nature of such defendant's ownership. *Ibid.*

SHIPPING-NOTE.

A consignee of goods delivering over to a third person the shipping-note of such goods, and a delivery-order on the wharfinger to deliver such goods as soon as they arrive, does not pass the property in them so as to prevent a stoppage *in transitu* by the consignor. *Akerman v. Humphery.* 53

SHOOTING.

If a person shoots at another who is endeavouring to apprehend him, he may be convicted on the usual indictment for shooting with intent to murder; though shooting to prevent apprehending is also a distinct capital offence under Lord Ellenborough's act. *Rex v. Davis.*

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SLANDER.

1. Slander of a school for filch and bad food; which was justified. To rebut the justifications the plaintiff's counsel cannot ask how boys are treated at any other particular school; nor can he ask as to the manner of their education; because it was not called in question by the slander. *Boldron v. Widdows.*

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2. If the plaintiff has applied to the under-sheriff of Middlesex to appoint him a sheriff's officer, and in answer to the inquiries of the under-sheriff as to his fitness, the defendant, another officer to whom the plaintiff had been a bailiff's follower, says, he robbed him: such communication is confidential; and as much privileged as the communication of a master in giving a character to a servant; and in such a case it is competent to the master, under the general issue, to put in proof any fact which goes to shew that in making the slanderous assertions, he was not actuated by malice. *Sims v. Kinder.* Page 279 See *Bromage and Prosser.*

475, 673

3. If the defendant let judgment go by default, and on the execution of the writ of inquiry neither party goes into any evidence, the jury may give such moderate damages as they think right. *Tripp v. Thomas.*

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SOLICITOR.

See PAUPER'S FORM.

STOPPING IN TRANSITU.

STAGE-COACH.

See NOTICE, 3.

Whether writing mourning on a money-parcel is a fraud on the stage-coach proprietor.—*Quære. Mayhem v. James.*

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STAMP.

See TENDER.

1. An attested copy of a deed on a 1s. stamp is admissible as secondary evidence. *Ditcher v. Kenrick.*

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2. Whether an agreement in a series of letters containing less than 1080 words requires a stamp of 1s. 15s. *Quære. Parkins v. Moravia.*

376, 507

3. A release to two joint acceptors of a bill requires but one stamp. *Rex v. Bayley.*

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STEWARD.

1. The appointment of a person as steward of a manor for life is good. *Bartlet v. Downes.*

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2. If tenant in fee of a manor by deed appoints a steward of that manor for his life, and devises the manor in fee to a third person, such appointment is valid, and he cannot be afterwards displaced by the devisee. *Ibid.*

STOPPING IN TRANSITU.

See SHIPPING-NOTE.

If the vendor of tallows in the warehouses of the London Dock Company sell such tallows, and give an order addressed to the company, by which they are directed "to weigh, deliver, transfer, or re-house," the tallows to Messrs. M. and B.; this order being received at the Docks, and M. and B. having sold the tallows and received the money for them, the original vendor cannot stop them in the hands of the company, though the tallows have not been weighed. It appearing that a

SURETY.

weighing, if the sale takes place (as this did) soon after the importation, is not usually required; the weight on which the custom-house duties were paid, in such case being considered by the parties as correct and sufficient. *Barton and another v. Boddington, Esq.* Page 207

STOCK.

See Bond, 2.

STOCK-JOBGING.

In an action on a bill of exchange, a stock-broker may refuse to give evidence that the consideration of it was stock-jobbing differences; but whether he is bound to produce his book kept under the stat. 7 G. 2, c. 8, s. 9.—*Quære. Rawlings v. Hall.* 11, 335

SUIT, MALICIOUS, ARREST ON.

The defendant had taken the opinion of a special pleader, as to whether the plaintiff was liable for a debt; whose opinion was favorable to the defendant. The defendant caused the plaintiff to be arrested for it. In action for this arrest, charged to be malicious, the jury found for the plaintiff; and the Court above would not disturb the verdict. *Revenge v. Macintosh.* Page 204

SUNDAY.

In an action for a breach of warranty of a horse, the defendant cannot be allowed to set up that he was a horse-dealer, and sold the horse on a Sunday, contrary to the provisions of the stat. of 29 Car. 2. c. 7. *Blossome v. Williams.*

294, 336

SURETY.

A letter from a surety for a collector to the obligees of his bond, stating that he will not be liable after the date of the letter, is no defence

TENANT.

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to an action on the bond for a deficit subsequent to the letter, if it be not pleaded specially.—If it be so pleaded.—*Quære. Hough and another v. Warr.* 151

SURRENDER.

See Term.

SURVEYOR.

1. If he makes an estimate considerably erroneous, from not examining the ground for the foundation, he is not entitled to recover for his plans, &c. *Money Penny v. Hartland.* 352
2. If he is a shareholder he can maintain no action. *Ibid.*
3. *Semble*, If the Committee under a Bridge Act employ him, the trustees, not the committee, are liable to his action for payment. *Ibid.*

TALES.

1. Since the stat. 7 & 8 W. 3, c. 32, talesmen can only be taken from the panel of the jury summoned to try the other causes, and not from the by-standers. *Rea v. Hill.* 667
2. On a trial of an information in nature of a *quo warranto*, which has been made a special-jury cause, jurors who have been summoned to try the prisoners on the crown side of the assize, are not thereby qualified to act as talesmen. *Rea v. Tipping.* Page 608

TENANT.

1. In an action of debt on 11 G. 2, c. 19, against a tenant, for fraudulently removing his goods to avoid a distress; it is immaterial whether the removal is in the night or not. Evidence that the tenant's sons removed the goods, with his consent, will support a declaration against him for removing the goods, and them, for assisting him in such removal. *Lyster, Esq. v. Brown and others.* 121

2. Under a covenant that tenant "should and would substantially repair, uphold, and maintain" a house, he must keep up the inside painting. *Monk v. Noyes.* 265

TENDER.

1. A plea of tender is not supported by proving that the defendant took a sum of money out of his pocket, and said to the plaintiff, "If you will give me a stamped receipt, I will pay you the money:" as by the stat. 43 G. 3, c. 126, the payer of money may provide the stamp and charge for it: and a tender must always be unconditional. *Laing v. Meader.* 257
2. A tender to a collector appointed by the solicitor to a commission of bankrupt, is not good; he having no discretion on the subject. *Blow v. Russell.* 365
3. If a person tender money, but will not pay it unless the person to whom it is tendered, will give him a receipt in full of all demands, such a tender is bad. *Griffith v. Hodges.* 419

TERM.

If no evidence is given of the existence of a term to attend the inheritance, since the year 1793, and the owner of the fee has acted as if it had been surrendered, the jury may presume that it has been surrendered; the purpose for which the term was created having been long since fulfilled. *Bartlet v. Downes.* 522

THEATRE.

In an action against a performer for not performing at a licensed theatre, pursuant to his contract, evidence that the performances have gone on without interruption, is sufficient *prima facie* evidence that the theatre is duly licensed. *Rodwell v. Redge.* 220

TITHES.

THREATENING.

See ROBBERY.

TITHE-COMPOSITION.

A tithe-composition being at one undivided sum from Michaelmas to Michaelmas, the tenant going away at Lady-day must pay up the composition to the ensuing Michaelmas. *Hulme, Clerk, v. Pardoe, Widow.* Page 93, 336

TITHES.

1. In an action by a vicar for not setting out prædial tithes, proof of a single payment to him, or any of his predecessors, of that species of tithe, is evidence to go to the jury, that the vicars of that place are endowed with that species of tithe. *Apperley, Clerk, v. Gill.* 316
2. On issues to try *modus*, owners of lands in the parish are not competent witnesses; and the depositions of such witnesses as are dead, cannot be read, if it is shewn that they were interested, though no such thing appears in the deposition, and though their evidence was read in equity. *Jones and others, v. Carrington, Clerk.* 328
3. Receipts of a vicar's lessee are admissible evidence of a *modus*, which is sufficient proof that he is lessee. *S. C.* 329
4. If a witness prove that her father and brother were tenants of tithes for above 40 years, that is sufficient to let in their receipts, without proving a lease to them. *S. C.* 497
5. If a *modus* is laid in an issue from Chancery, to extend over a whole parish, and the jury so find, the Court of C. will not grant a new trial, because a hamlet, in the tithes of which neither plaintiffs nor defendant were interested, was a part of that parish, and not covered by the *modus*. *Ibid.*

6. If, at the trial, an interested witness, who brought documents, was allowed to give inadmissible evidence to support them; yet a Court of Equity will refuse a new trial, if there was enough to support the verdict without them. *Ibid.*

TRESPASS.

See WITNESS, 16.

1. If parties having a right to a garden, have given another notice not to trespass there, and afterwards they give that person half a-year's notice to quit all gardens held of them, at a time later than all the alleged trespasses; they can bring no action for such trespasses, because they have since acknowledged the defendant as their tenant. *Barton and others v. Cordy.* 664
2. A dog jumping into a field without the consent of his master is not a trespass. *Brown v. Giles.* 119

TROVER.

See BANKRUPT, 14.

1. An insolvent cannot maintain trover for plate, though his assignee does not interfere to prevent him. *Lea v. Telfer.* 146
2. A horse was kept at the defendant's stables; and one day when he was from home, three or four of his servants being in charge of the premises, the horse was taken away. The defendant blamed the ostler for letting it be taken; but on being himself remonstrated with, replied, that it was of no consequence, because he was indemnified.—Held, that in such case, trover would not lie. *Barnard, Assignee of Thurtall, v. How.* 366
3. If *A.* sells corn to *B.* who buys on speculation, and the corn is landed at the warehouse of *C.* (the granary-keeper of *B.*) who is told that he is to hold it on the account of *A.*—*A.* has a sufficient property

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in it to enable him to maintain trover against *C.* *Woodley v. Brown.*

Page 693

4. And a return, made by *A.* under the stat. 1 & 2 G. 4, c. 87, s. 12, of such corn as sold and delivered to *B.* is not conclusive evidence against *A.* of an absolute unconditional sale and delivery. *Ibid.*
5. In trover, the jury are not limited to find as damages the mere value of the property at the time of the conversion, but they may find as damages the value at a subsequent time, in their discretions. *Greening v. Wilkinson.* 625

VARIANCE.

See PRACTICE, 9, 10.

1. In action of covenant, in setting out the deed, if the word "an" is written instead of "one;" and the name "Burl," instead of "Bart;" these are not fatal variances.

Nor is the stating a lease to be for 21 years, and proving it to be 21 years determinable at the option of either party at the end of seven or fourteen years.

If the defendant alleges a seisin in fee by it, and the plaintiff in the replication, traverse that plea, he is at liberty to shew that *A.* had only an estate for life, and need not reply that specially. *Hill v. Sanders.* 80

2. An indictment for stealing "a brass furnace" in the county of *H.* is not supported by evidence of stealing a brass furnace in the county of *R.*, and breaking it there, and bringing the pieces into *H.*shire. *Rea v. Holloway.* 127
3. An indictment for stealing two turkeys, not supported by proof of stealing two dead turkeys. *S. C.* 128
4. *Semble*, That in actions for malicious prosecution, the record, in setting out the indictment, saying

"then and there did make an assault," the indictment really saying "did then and there make an assault," is no variance. However, the judge at the assizes will allow it to be amended on summons, as he will the word "plaintiff" for the word "defendant," in the record. *Freeman v. Arkell.* Page 137.

5. "Adjoining the new houses" instead of "adjoining the new house" is a fatal variance in an indictment for perjury, in an answer in Chancery, though the perjury is not assigned on any thing sworn as to this clause of the agreement. *Rex v. Spencer.* 261

6. Proof that a conveyance was executed to a person named by the defendant, will support an averment in the declaration, that he himself "became the purchaser." *Seaman v. Price.* 586

7. If the declaration state that the defendant being owner of a stage-coach, undertook to carry "the plaintiff, her children, and servants together, in and by a certain stage-coach"—Evidence, that the *whole inside* of the coach was taken for the plaintiff and her three daughters, and two outside *places* for her servants, will support the declaration. *Long v. Horne.* 610

VENUE.

See VARIANCE, 2.

VETERINARY COLLEGE.

See USAGE OF TRADE, 2.

A certificate of the Veterinary College is not evidence, not coming from a body known to the law. *Sewell v. Corp.* 392

USAGE OF TRADE.

1. The usage of trade must be certain and universal, to make it binding on transactions in such trade. *Wood, Assignee of Hall, v. Wood.* 59
2. Persons employing one of a trade or profession, where there is a ge-

WAVER.

neral usage, will be taken to have dealt with him according to that usage. *Sewell v. Corp.* Page 392

3. Usage for a veterinary surgeon to charge for his attendances, when much medicine was not necessary, is too uncertain. *Ibid.*

USE AND OCCUPATION.

See SETT-OFF, 2.

If there has been an agreement for a lease, on which the defendant was let into possession, and it is not proved that a lease was tendered, signed by proper lessors, the owner of the premises cannot maintain an action for use and occupation. *Rumball v. Wright.* 589

USURY.

See PLEADING, 3.

A security given in lieu of a former security, which was tainted by usury, is void; unless in the second security a deduction is made of all sums paid usuriously under the former security. *Wickes v. Gogerly.* 396

WAGER.

If an action for money had and received is brought against the stakeholder, on a dog-fight, to recover the stakes, on the ground that the plaintiff's dog won, the judge will order it to be struck out of the cause-paper, as he will not try which dog won the battle. *Egerton, Esq. v. Furzeman.* 613

WARRANTY.

See FRAUD.

If a commodity having a fixed value is sold for a particular purpose, and it turns out unfit, whether an action lies, though there has been no warranty.—*Quære.* *Gray and another v. Cox and another.*

184, 491

WAVER.

1. A person having a *lien* upon goods, does not wave that *lien* by

the mere fact of his omitting to say that he claims the goods in that right, when they are demanded.

Nor is it sufficient evidence of a waiver of his *lien*, that he bought these goods with others, and also refuses to deliver up the other goods, though he has no *lien* on them; the sale of both sets of goods being void. *White and another, Assigness of Syms, v. Gainer.*

Page 324

2. If ejectment is brought on a forfeiture of a lease, and after the bringing of such ejectment the landlord accept rent, it is no waiver of the forfeiture. *Doe, d. Morecraft, v. Meux.*

346

WHARF.

By a private act of Parliament, the London Dock Company was to be sued for injuries within six months after the *fact committed*:—Held, that the limitation ran from the time of the consequential injury happening; the act at first not being tortious or injurious. *Gillon v. Boddington.*

541

WHARFINGER.

If goods be sent to a wharf, to go by a vessel to any place on the coast of England, the wharfinger does not discharge his duty by delivering them to one of the crew, but should deliver them to the captain of the vessel, or some other person in authority on board it. *Semble*, that it is his duty, either by himself or his servants, to see the goods put on board, and then make an entry of the shipment. *Leigh v. Smith.*

638

WITNESS.

See ATTORNEY, 4.—CROSS EXAMINATION, 1.—DRIVING, NEGLIGENT, 4.—EVIDENCE, 4.—EXPENSES, 1.—MARRIAGE, BREACH OF PROMISE OF 1.—PLEADING, 1.—PRACTICE, 6.

1. Whether in an action for work and

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labour, the party who actually did the work is a competent witness to prove that he, and not the plaintiff, is the person to be paid. *Quære. Martin v. Jackson.*

Page 17

2. The defendant having contracted to rebuild a house, employed the plaintiff to do the bricklayers' work. The owner of the house, who had paid neither of them, is a competent witness to prove that the plaintiff did the work. *Goodman v. Love.*

76

3. Though the counsel for the prosecution is not *bound* to call every witness whose name is on the back of the indictment, the judge will sometimes call those omitted to be called for the prosecution. *Rex v. Simmonds.*

84

4. Witnesses cannot be cross-examined to facts not in issue, if such facts are injurious to the characters of persons not connected with the cause.

In seduction cases the plaintiff's counsel may call witnesses to the general good character of the party seduced, if her character has been attacked in cross-examination.

Bate, Widow, v. Hill.

100

5. In all cases where the validity of a commission of bankrupt is tried, every creditor of the estate is incompetent as a witness. *Hallen v. Homer.*

108

6. In trespass, *quare clausum fregit*, if the defendant justifies *inter alia* that the *locus* is a free-wharf for the inhabitants of O., an inhabitant of O. is an incompetent witness; but if the defendant's counsel consent to wave that plea, he is competent.

Prewit v. Tilly.

140

7. The assistant to a sheriff's officer, who is left in possession under an execution, is a competent witness for the sheriff, in an action for a false return. *Clark v. Lucas and another.*

156

8. A factor having pledged goods to several persons, the factor is a com-

petent witness in an action of *trover* against the parties having the goods. *Greenway* and another v. *Fisher* and others. Page 190

9. A person is a competent witness for the plaintiff in an action for goods sold, though he is to receive a commission on the sale. *Murley* and another v. *Langrick*. 216

10. If a bankrupt has had his certificate and has released his assignees, it is sufficient, on an objection to his competency as a witness, for him to state that he has released his assignees, without producing the release. *Carlisle* and others, Assignees of *Russel* v. *Eady*. 234

11. In an action by the assignees of an insolvent debtor, to recover money from one of the creditors, which ought to have gone to the general fund, the insolvent is not a competent witness on the part of the plaintiff. *Rudge* and another v. *Ferguson*. 253

12. If a witness being cautioned that he is not obliged to answer questions which tend to criminate him, still does answer such questions, he cannot afterwards take the objection to any further question, relative to that whole transaction. *Dixon* v. *Vale* and others. 278

13. The widow of a deceased person is a competent witness for the plaintiff in an action brought against the executors of such person, on a promise made by him in his lifetime. *Beveridge* v. *Minter*. 364

14. The judge at a trial will not compel a witness to say where he lives, if he states that he believes a bailable writ is out against him at the

instigation of the party asking. *Watson* v. *Bevern*. Page 368

15. An articulated clerk to an attorney, who is bound by his articles to keep his master's secrets, is at liberty to give in evidence statements of his master not made under a charge of secrecy, nor affecting the interest of his master's clients; though the disclosure may go to support a civil action against the master. *Webb* v. *Smith*. 337

16. A defendant in trespass who has suffered judgment to go by default, is not a competent witness for other defendants in the same action, who have pleaded, if the jury have to assess the damages against him, as well as to try the issue as to the other defendants. *Mash* v. *Smith* and others. 577

17. If a paper be put into the hands of a witness to refresh his memory, the counsel on the opposite side have a right to see it, but if it is merely given to him to prove a hand-writing to it, they have not. *Sinclair* v. *Stevenson*. 582

18. If a creditor of a bankrupt agrees to release the estate, on an undertaking by the assignees to pay him what should appear to be justly due, he is a competent witness for the assignees. *Ibid*.

WORK AND LABOUR.

See CREDIT, 1.

WRIT OF INQUIRY.

See SLANDER, 4.

END OF VOL. I.

